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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Appeal from the Supreme Court of Ohio

S. S. KRESGE CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT

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Appellee.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Ohio, entered March 23, 1960, affirming the decision of the Board of Tax Appeals of Ohio.

This statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is presented.

I

REFERENCE TO OPINIONS BELOW

The decision of the Board of Tax Appeals of Ohio was entered May 21, 1959, being Case No. 36,585 on the Board's docket (unreported, see Appendix II).

The opinion of the Supreme Court of Ohio was entered on March 23, 1960, *S. S. Kresge Company vs. Bowers*, 170 Ohio St., 405, 166 N. E. 2d, 139 (See Appendix III). Rehearing denied April 13, 1960.

II

STATUTORY PROVISION CONFERRING JURISDICTION

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant case is conferred by Title 28, United States Code Section 1257 (2).

III

STATUTES OF THE STATE

The Validity of Which is Involved Herein

The statutes of the State of Ohio, the validity of the construction of which has been sustained by final judgment of the Supreme Court of Ohio as not being repugnant to the Constitution of the United States, are the statutes providing for and relating to the assessment of Ohio retail sales taxes against a vendor based upon test checks of the vendor's business for a representative period and other information relating to sales made by such vendor. Those statutes are Sections 5739.04, 5739.10 and 5739.13 Revised Code of Ohio (See Appendix VII).

The statute of the State of Ohio granting the right of appeal to the Supreme Court of Ohio from the Board of

Tax Appeals of Ohio is Section 5717.04 Revised Code of Ohio (See Appendix VII).

The above statutes of Ohio, as construed and applied by the judgment of the Supreme Court of Ohio are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, the pertinent part of which is quoted in Appendix VI.

IV

NATURE OF CASE AND RULING OF THE COURT

The Ohio retail sales tax does not apply to sales under 41¢, Section 5739.02 Revised Code of Ohio (See Appendix VII).

Section 5739.10, Revised Code of Ohio, (See Appendix VII) permits test checks of the Vendor's business for a representative period under certain circumstances. Section 5739.10, reading in applicable part, as follows:

> "* * * no vendor shall be required to maintain records of individual retail sales of tangible personal property under forty-one cents, and no assessment shall be made against any vendor for retail sales of less than forty-one cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than forty-one cents; provided that where a vendor does not have adequate records of receipts from his retail sales in excess of forty cents, the tax commissioner may refuse to accept the vendor's return, and upon the basis of test checks of the vendor's business for a representative period, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales. * * *"

Proceedings leading to this appeal began when the Tax Commissioner of Ohio issued sales tax deficiency assessments for the calendar years 1952, 1953, 1954 and 1955,

against thirty-six stores operated by the appellant in Ohio during such years, upon the basis of test checks of only six days duration. The Commissioner contended that the appellant did not have adequate records of sales over forty cents, sales under forty-one cents being exempt from the Ohio retail sales tax by statute (See Appendix VII). As a result the Commissioner took test checks as aforesaid, and retroactively applied the results thereof without any adjustment whatsoever to the assessment period, January 1, 1952 to December 31, 1955, the test checks being conducted in four stores of the 36 stores in March, 1956, and six stores of the 36 stores in April, 1956, and twenty-six stores of the 36 stores in May 1956. No assessment was made by the Commissioner for the semi-annual period, i.e., January 1 to June 30, 1956, during which time the test checks were taken.

Appellant filed its petition for reassessment with the Commissioner on August 20, 1956, and on February 21, 1958, he affirmed the assessment in the original amount, without any adjustment whatsover (See Appendix I). The appellant then appealed to the Board of Tax Appeals of Ohio and there again pressed its position that adequate records of sales over forty cents were available and that in any event the six day test checks of the vendor's business, made during March, April and May 1956, were not for a representative period as required by the statute, since such a 1956 test check, when related back to 1952, 1953, 1954 and 1955, without appropriate adjustment, did not reflect the basic changes in the appellant's merchandising and sales policy. The appellant further objected that the Commissioner had failed to consider "other information relating to the sales made by such vendor" i.e., the appellant, as required by Section 5739.10, Revised Code of Ohio.

At the hearing before the Board of Tax Appeals, the appellant submitted substantial and uncontradicted evidence in support of its position, while the Commissioner relied entirely upon his own mathematical calculations and offered no evidence whatsoever in support thereof. The Board of Tax Appeals, on May 21, 1959, journalized its decision affirming the order of the Commissioner (unreported, See Appendix II).

On June 17, 1960, appellant appealed to the Supreme Court of Ohio. The appellant contended that it had adequate records of sales over forty cents and that the Commissioner was, therefore, without authority to make the 1956 test checks of the vendor's business; that the six day test checks of the appellant's business, made by the Commissioner in 1956, were not representative of the appellant's business during the assessment period, 1952 to 1955 inclusive, because of basic changes in merchandising and sales policy during the period 1952 to 1955 inclusive; that the Commissioner did not consider "other information relating to the sales made by such vendor", i.e., the appellant, as required by the statute. The appellant at this point also contended the construction placed on the applicable statutes of the State of Ohio by the Board of Tax Appeals created an irrebuttable presumption which deprived the appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The appellant further contended that the retroactive application to the years 1952 to 1955 inclusive of the non-representative test checks made in 1956, and the Commissioner's failure to consider "other information relating to sales by such vendor", i.e., appellant, as required by the statute, deprived it of its property without due process of law in violation of Section 1 of the Four-

teenth Amendent of the Constitution of the United States. The Court noted that the appellant's Federal Constitutional question had been raised in a timely manner but refused to consider the appellant's proof and contentions, holding that the appellant was estopped from complaining about the representativeness of the 1956 test checks and their application to the years 1952 to 1956, inclusive. The Court's decision establishing such estoppel rested upon a conclusion that the appellant and not the Commissioner had selected the 36 stores, the times and the manner of making the six day test checks of the appellant's business in 1956. *S. S. Kresge Company v. Bowers*, 170 Ohio St., 405, 166 N. E. 2d 139, decided March 23, 1960, and journalized by entry on the same date (See Appendix III). Application for rehearing was filed by the appellant in the Supreme Court of Ohio on April 5, 1960. Appellant's application for rehearing directed the Court's attention to the record in the case and contended that the estoppel, as established by the Court, was based upon a mistake of fact. The appellant at this time also objected to the decision of the Court in that it denied appellant a hearing on appeal as provided by the statute (See Appendix VII), and thus further deprived the appellant of due process in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. Appellant's application for rehearing was denied April 14, 1960, and the denial journalized by entry on the same date.

From the above judgment a notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio on July 7, 1960.

V

STAGE AT WHICH FEDERAL QUESTIONS WERE RAISED

The appellant raised its initial Federal Constitutional objection in its notice of appeal to the Supreme Court of Ohio. According to the statutes of Ohio, the Board of Tax Appeals is an administrative agency without jurisdiction to consider and determine a question of Federal Constitutionality. For that reason the Federal Constitutional question was appropriately first raised in the Supreme Court of Ohio. The Supreme Court of Ohio held that the Federal Constitutional question was properly before it, thus eliminating any question of timeliness in interposing that objection. *Whitney v. California*, 274 U. S. 357, 71 L. Ed. 1095, 47 S. Ct. 641; *Manhattan Life Insurance Company v. Cohen*, 234 U. S. 123, 58 L. Ed. 1245, 34 S. Ct. 874.

In its petition for rehearing filed in the Supreme Court of Ohio, the appellant for the first time contended that its Federal Constitutional rights had been violated by the denial by the Court of a hearing as provided by law. It is well established that where an appellant is taken by surprise by an action of a State Court, which could not have reasonably been anticipated, a Federal Constitutional question may be properly raised in the petition for rehearing. *Herndon v. Georgia*, 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794. The appellant, in this case, could not reasonably have anticipated that the court, based upon a mistake of fact, would hold that appellant was estopped to complain and would refuse to review the decision of the Board of Tax Appeals, which held that the 1956 test checks of the appellant's business were for a representative period and that the assessments made thereunder were valid. In refusing to review the decision of the Board of Tax Appeals, the

Court ignored the provision of Section 5717.04, Revised Code of Ohio (See Appendix VII), which provides for direct appeal to the Court from a decision of the Board of Tax Appeals. This issue was then presented to the Supreme Court of Ohio at appellant's first opportunity, i.e., in the petition for rehearing.

VI

QUESTIONS PRESENTED

This appeal presents the following questions:

First, does Section 5739.10 Revised Code of Ohio, as construed and applied by the Supreme Court of Ohio, deprive appellant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by establishing an arbitrary and irrebuttable presumption that a six day test check conducted to determine the percentage of appellant's taxable sales was representative of the four years assessment period?

Second, does the decision of the Supreme Court of Ohio deprive appellant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that the court arbitrarily refused to consider and give effect to the uncontradicted evidence of appellant that the six day test checks conducted to determine the percentage of appellant's sales over 40 cents were not representative of the four years assessment period?

Three, does the decision of the Supreme Court of Ohio deprive appellant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that the Court arbitrarily refused to give effect to that part of Section 5739.10, Revised Code of Ohio, which re-

quires that when an assessment is made pursuant to a test check "other information relating to sales made for such vendor", i. e., appellant, must be taken into account when determining the percentage of taxable sales?

VII

CASES SUPPORTING JURISDICTION

This is an appeal taken pursuant to Title 28, United States Code, Section 1257 (2), and the cases believed to support it are *Roberts v. New York*, 295 U. S. 264, 79 L. Ed. 1429, 55 S. Ct. 689; *Chicago B. & Q. R. Company v. Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 S. Ct. 581; *A. Backus & Sons v. Fort Street Union Depot Company*, 169 U. S. 557, 42 L. Ed. 853, 18 S. Ct. 445; *Appleby v. Buffalo*, 221 U. S. 524, 55 L. Ed. 838, 31 S. Ct. 699; *American Railway Express Company v. Kentucky*, 273 U. S. 269, 71 L. Ed. 639, 47 S. Ct. 353; *Southern P. Company v. Schuyler*, 227 U. S. 611, 67 L. Ed. 669, 33 S. Ct. 277; *North Carolina R. Company v. Zachary*, 232 U. S. 248, 58 L. Ed. 594, 34 S. Ct. 305; *Carlton v. Washington*, 234 U. S. 103, 58 L. Ed. 1237, 34 S. Ct. 717; *Norfolk & Western Railway Company v. Conley*, 236 U. S. 605, 59 L. Ed. 745, 35 S. Ct. 437; *Interstate Amusement Company v. Albert*, 239 U. S. 560, 60 L. Ed. 439, 36 S. Ct. 168; *Postal Telegraph Company v. Newport*, 247 U. S. 464, 62 L. Ed. 1215, 38 S. Ct. 566; *West v. Louisiana*, 196 U. S. 258, 48 L. Ed. 965, 24 S. Ct. 650; *Fiske v. Kansas*, 274 U. S. 380, 71 L. Ed. 1108, 47 S. Ct. 655; *Northern Pacific Railway Company v. North Dakota*, 236 U. S. 585, 59 L. Ed. 235, 35 S. Ct. 429; *Aetna Life Insurance Company v. Dunken*, 266 U. S. 389, 69 L. Ed. 342, 45 S. Ct. 129; *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124; *Creswill v. Grand Lodge*, 225 U. S. 246, 56 L. Ed. 1074, 32 S. Ct. 822; *Sterling v. Constantin*, 287 U. S. 378,

77 L. Ed. 375, 53 S. Ct. 190; *Norris v. Alabama*, 295 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579; *Herndon v. Georgia*, 295 U. S. 441, 79 L. Ed. 530, 55 S. Ct. 794; *Brinkerhoff-Faris Trust & Savings Co. v. Warren Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

VIII

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

The questions presented by this appeal are both unique and substantial and emanate from two completely separable instances of violation of appellant's Federal Constitutional rights by the Supreme Court of Ohio. Appellant, in its notice of appeal to the Supreme Court of Ohio sought restoration of its Federal Constitutional rights which had been violated by the Board of Tax Appeals in finding that the six day test checks conducted by the Commissioner in 1956 were representative of appellant's business during the period January 1, 1952 to 1955 and which 1956 test checks were so applied by the Board of Tax Appeals to appellant's business for the period January 1, 1952 to December 31, 1955. Appellant also sought from the Court restoration of Federal Constitutional rights denied by the Board of Tax Appeals in failing to require the Commissioner to consider "other information relating to sales made by such vendor", i. e., appellant, before an assessment was made. Further, the appellant sought from the Court restoration of Federal Constitutional rights denied it by the Board of Tax Appeals by the application of an irrebuttable presumption against appellant in favor of the Commissioner.

These errors were compounded and an even greater injustice wrought against appellant by the action of the Supreme Court of Ohio in refusing to even consider these

questions. In estopping this appellant from complaining of these errors, the Court, at page 407 of its opinion said:

> "The question of the validity of the various test checks disappears when it is observed that they were made at each of thirty-six of the appellant's stores in each department thereof for six day periods in the manner, at the stores and at times suggested by the appellant itself. Under these circumstances, the appellant cannot be heard to complain * * *."

A denial of judicial review of an arbitrary administrative act by the only actual Court to hear this case, having the power and duty to consider the Federal Constitutional questions involved, is, in itself, a denial of appellant's rights under the due process clause of the Constitution of the United States. Only by the exercise of jurisdiction by this Court in this case will appellant be afforded the opportunity to effectively raise its objection to the denial of its Federal Constitutional rights. The issue with respect to this ground of appeal does not concern itself with the ultimate correctness or incorrectness of the assessment made against appellant. Rather, the issue is simply the right of appellant on appeal to have considered its Federal Constitutional objections to which there can be no estoppel. As noted by the Court in *Brinkerhoff-Faris Trust & Savings Co. v. Warren Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 541, at page 682,

> "* * * We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising out of the federal constitution and, consequently, one on which the opinion of the State Court is not final * * *. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it had an opportunity to present its case and be heard in support."

Appellant had no opportunity to present its Federal Constitutional objections to the Board of Tax Appeals, since that Board has no jurisdiction to consider them. Due process, when applied to judicial proceedings, requires a tribunal competent to pass upon the subject matter of the suit. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. The Supreme Court of Ohio refused to hear the appellant on the question of the denial of its Federal Constitutional rights and, thus, denied it the only opportunity to be heard by a Court thereon. Such refusal, by the Supreme Court of Ohio, to hear the arguments of appellant clearly denies it due process of law as guaranteed by the Constitution of the United States.

Where that denial is based on a fantastic mistake of fact, without any support whatsoever in the record of the case, exercise of jurisdiction by this Court is imperative if the Federal Constitutional rights guaranteed appellant are to be preserved. The fact before a State Court may be reviewed by this Court, "where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; * * *." *Fiske v. Kansas*, 274 U. S. 380, 71 L. Ed. 1108, 47 S. Ct. 655.

The record in this case clearly reveals that appellant at no time selected the 36 stores, the times or the manner of making the test checks which were taken by the Commissioner. For appellant to have done so would have contravened the long established administrative practices of the Ohio Department ~~of Taxation, which~~ Department, at all times, has selected the stores of vendors to be test checked and has established the procedures therefor. The testimony of the State's own witness, N. E. Volsko, at pages 370 and 371 of the record in this case, completely disposes

of any dispute as to who selected the 36 stores of appellant and the times and manner of making the 1956 test checks and the Court's misconception in that point:

"Q. And how many stores did you finally check? A. There were 36 stores (out of a total of 83) checked and included in our audit.

Q. Was there any reason for picking out just 36 stores? A. Time was the element that entered into it. It was a tremendous job test-checking these stores, and the Department had to obtain full cooperation from the company preparing these stores for these test checks, and since all 83 (Ohio) stores could not be test-checked (by the Department) to select the stores (36) to be test checked that were on a departmental basis."

(Parenthetical matter added for clarification)

Again, at page 372 in this case, Volsko testified:

"A. By departmentalizing their sales and likewise departmentalizing the sales made during the test check, it was the intent of the department to eliminate any particular items controlling the percentages."

Again, at page 388:

"Q. Now, who selected the stores to be test-checked in this assessment? A. The department selected the stores.

Examiner Kirwin: You are talking about the Department of Taxation?

The Witness: The Department of Taxation.

Q. And you asked our cooperation in taking the test check (by the Department)? A. That is right."

(Parenthetical matter added for clarification)

For this Court's convenience the confidential remarks of the sales tax examiners who conducted the test checks and the report of Mr. Walter W. Sweeney, the sales tax official who supervised the test checks, to Mr. J. E. Williams, Chief of the Sales and Use Tax Division, Ohio Department of

Taxation, are attached hereto and set forth in their entirety in Appendices IV and V. These documents, which are a part of the record of this case, conclusively prove that the appellant did not select the 36 stores, the times or the manner of making the test checks in issue. It has never been disputed that the appellant, in an endeavor to maintain a reasonably amicable relationship with the duly and lawfully constituted public taxing authority of the State of Ohio, submitted to the demands of the Commissioner and at his request carried out the mechanical steps of tabulation. There was no more consent by the taxpayer in this case than there is in a case of rape at the point of a knife. Page 115 of Volume 2 of the record in this case plainly evidences appellant's continued and repeated objections to the test checks and their application for the caption at the top of each tally sheet used in the 1956 test checks read as follows:

> "This tally is made at the request of the Ohio Department of Taxation. The S. S. Kresge Company does not acquiesce, consent or agree that the figures listed are representative of the sales for any period other than the day and date hereof."

Assuming that the Court was right, and that appellant selected the 36 stores and the times and manner of the test checks, appellant was still entitled to be heard on the merits. For not even the Court suggested that appellant agreed to the application of the six day test checks taken in 1956 to the assessment period January 1, 1952 to December 31, 1955, inclusive, or that appellant agreed that the complete failure of the Commissioner to consider "other information relating to sales made by such vendor", i. e. appellant, was proper. A most grave violation of appellant's Federal Constitutional rights is present in this case—

the denial of the right to be heard. Appellant asks this court to take jurisdiction so that this Federal Constitutional right may be restored to this appellant.

Had the appellant been accorded the judicial forum guaranteed by the Constitution of the United States, the Supreme Court of Ohio in reviewing the decision of the Board of Tax Appeals should have found that the appellant was denied due process of law by the creation of an irrebuttable presumption. No question exists that the appellant had the burden of proof. It is a well established rule of law, however, that presumptions disappear in the face of clear, substantial and uncontradicted evidence. In the face of such evidence, while the burden of proof did not shift, it was the duty of the Commissioner to go forward and present a case which, at that point, must be supported by more than a mere presumption of the validity of his assessment. In so many words, it was the duty of the Commissioner to support the assessment, but which he obviously failed to do in any manner whatsoever. The Supreme Court of Ohio, by its inaction, supported a line of reasoning which requires a taxing authority, or other public authority, to do nothing in the face of substantial and uncontradicted evidence, impeaching the public action complained of thus clearly creating an irrebuttable presumption in favor of the State.

That an irrebuttable presumption is proscribed by Section 1 of Article 14 of the Constitution of the United States may readily be seen by reference to *Schlesinger v. Wisconsin*, 270 U. S. 230, 70 L. Ed. 557, 46 S. Ct. 260, and *Heiner v. Donnan*, 285 U. S. 312, 76 L. Ed. 772, 52 S. Ct. 358. An error of this magnitude is one that well deserves attention by the highest judicial body in the land. As the Court

noted in *West v. Louisiana*, 194 U. S. 258, 48 L. Ed. 965, 24 S. Ct. 650, a State Court's decision will be reviewed where the action of the State Court:

> "* * * took away from plaintiff in error a right to such an independent and fundamental character as to deprive them of their liberty without due process of law."

While the protection of life itself is of primary importance, the protection of property rights is one of the foundations upon which this republic was founded. If, today, property rights may be expropriated by the arbitrary and capricious act of a public official without judicial review, then, tomorrow, personal liberty and life itself may be imperiled by application of the same ill advised principles which permitted the destruction of property rights. The present code of corroded public morality, rampant in portions of our society, is a direct result of the fundamental disrespect for the property rights and other rights of others.

Further, the Supreme Court of Ohio should have considered that at no place in these proceedings has the Commissioner revealed or been required to reveal what "other information relating to the sales made by such vendor", i. e., appellant, be considered before making the assessments in question. These assessments are, in fact, based exclusively on the retroactive application of the six day test checks taken in 1956 or four years after the first year (1952) of the assessment period, January 1, 1952 to December 31, 1955, although the applicable statute clearly requires such action to be taken on the basis of the test checks of the appellant's business for a representative period and the statute further requires "other information relating to the sales made by such vendor", i. e., appellant, and considered in the making of any assessment subsequent to the

test checks. To uphold the administrative action of a public official based upon one-half of a dual statutory requirement (that the test checks of the vendor's business be for a representative period) and the refusal to consider "other information relating to the sales made by such vendor", i. e., appellant, is a signal violation of the appellant's Federal Constitutional rights. Were this a criminal case and arraignment had been disregarded, no greater injustice would be present. The appellant, in the instant case, was denied recourse to the bar of justice and its civil rights denied just as surely as if it had been dragged to a tree and lynched. Such a gross and obvious error is arbitrary action and justifies review by this Court, *Roberts v. New York*, 295 U. S. 264, 79 L. Ed. 1429, 55 S. Ct. 689.

IX

CONCLUSION

Wherefore the appellant, S. S. Kresge Company, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal; and for all the reasons stated herein prays that the final judgment of the Supreme Court of Ohio be reversed and for such other relief as may be fit and proper.

Respectfully submitted,

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APPENDIX I

Order of Tax Commissioner

(Dated February 21, 1958)

The Tax Commissioner came to consider the above styled matter at a hearing scheduled thereon on August 14, 1957; Carlton S. Dargusch, Jr., Attorney at Law, 33 North High Street, Columbus, Ohio, appeared on behalf of the assessee.

Now, being fully advised thereon, the Commissioner finds that:

The subject assessment, Serial No. E-12037, was made against the assessee, the S. S. Kresge Company, on July 25, 1956; notice thereof being served upon the assessee on July 26, 1956. Said assessment being for sales tax, in the amount of $396,579.41, plus 15% penalty in the amount of $59,486.91, total $456,066.32.

On August 20, 1956 assessee filed a petition for reassessment, objecting as follows:

"S. S. Kresge Company objects to the assessment in whole and to each and every item in said assessment. More particularly, S. S. Kresge Company objects to the Tax Commissioner's test checks (taken in 1956 and applied to 1952, 1953, 1954 and 1955), the percentages he indicates for each department in each of the 36 Kresge stores that were test checked and the resulting figures. The Commissioner took these percentages as indicative of sales under 41¢ an dapplied these percentages against the total sales of each department in each store to get an amount of sales under 41¢. Through his erroneous calculations, his tabulations of sales under 41¢ were less than the amount reported by the Kresge Company and the Commissioner then made an assessment against the ST-10 returns (for years 1952, 1953, 1954 and 1955) of 36 Kresge stores. S. S. Kresge Company objects to the test checks, each percentage used.

the resultant figures obtained and to the assessment of each of the 36 stores. The amount of deficiency of each of the 36 stores is attached hereto and made a part of this petition.

S. S. Kresge Company objects to the assessment for the following reasons:

1. The Commissioner's calculations are based on erroneous and false test checks and percentages and thus the assessment is not in accordance with provisions of Sections 5739.01 through 5739.99 of the Revised Code of Ohio.

2. S. S. Kresge Company did have adequate records within the meaning of Section 5739.10 of the Revised Code.

3. The Tax Commissioner's test checks do not meet the requirements set forth in Section 5739.10 of the Revised Code.

4. The Tax Commissioner made use of only part of the evidence available to him, when he should have used all evidence.

S. S. Kresge also requests that the entire penalty be remitted."

This assessment is based upon test checks conducted in 36 stores of the assessee's 83 retail establishments in Ohio. Each of the 36 stores was checked for six consecutive days during either March, April or May 1956. Separate test checks were made in each of the departments which made taxable sales in each of the stores. The checks were made with the cooperation and assistance of the assessee's employees. The assessment is for liability incurred at the 36 stores checked. No effort has been made to apply the results of a test check to any store other than that store in which it was made.

Assessee's contention that the test check period is not representative of the assessee's business for the period covered by the assessment is not supported by evidence.

The contention that the calculations based on these test checks are erroneous in that the results do not agree with the returns filed by the assessee seem totally facetious. Obviously they do not agree or an assessment would not have been issued. Equally obvious, is the fact that the information contained in the assessee's returns was arrived at by computing backwards from the stamp cancelled. This procedure could give accurate results only if each and every clerk, in each of the various departments, in each of the 36 stores, cancelled the proper amount of prepaid tax receipts on each taxable sale. No evidence of such perfection has been submitted.

The assessee has failed to point out in what respect the Commissioner's calculations are erroneous or in what respect said test checks are false. In this connection it is noted that the data which comprises the test checks was compiled, in the first instance, by assessee's employees. Assessee has failed to point out which of these employees, to whom it attributes perfection in the cancellation of prepaid tax receipts, is responsible for submitting data which renders these test checks to be false.

Although the assessee contends it had adequate records within the meaning of Section 5739.10., R. C., it has not submitted such records, nor any evidence thereof.

As to the contention that the test checks do not meet the requirements of Section 5739.10, R. C., it is found that said contention is not well founded.

Finally, the contention that Commissioner made use of only a part of the evidence, apparently refers to what can only be described as a composite test check prepared by the assessee. This composite test check consists of a combination of various daily test checks of individual departments of individual stores, in such a way as to total one week's

operation of a single imaginary store. An examination reveals that the assessee has, in each instance, combined the minimum days of the minimum department of the minimum store. Thus, it arrives at a composite best check showing minimum test check of each store covered by the audit is obvious.

The assessee has failed to sustain any of the objections urged.

The petitioners request for the cancellation of the penalty is conditionally allowed as noted.

Therefore, it is the order of the Tax Commissioner that if payment of

	Assessment	Penalty	Total
(Sales)	$396,579.11	Canceled	$396,579.11

is made within thirty (30) days from date of receipt by the taxpayer of the journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals; to an appropriate Court of Appeals; or to the Supreme Court, said thiry (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

If the total amount is not paid as above provided, the assessment shall stand as issued in the following amount:

	Assessment	Penalty	Total
(Sales)	$396,579.41	$59,486.91	$456,066.32

Department of Taxation
s/ Stanley J. Bowers
Tax Commissioner

APPENDIX II

Entry of Board of Tax Appeals

(Dated May 21, 1959)

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of March 18, 1958, by the appellant above named from a final assessment order issued against it by the Tax Commissioner under date of February 21, 1958, as follows:

"The Tax Commissioner came to consider the above styled matter at a hearing scheduled thereon on August 14, 1957. Carlton S. Dargusch, Jr., Attorney at Law, 33 North High Street, Columbus, Ohio appeared on behalf of the assessee.

Now, being fully advised thereon, the Commissioner finds that:

The subject assessment, Serial No. E-12037, was made against the assessee, the S. S. Kresge Company, on July 25, 1956; notice thereof being served upon the assessee on July 26, 1956. Said assessment being for sales tax, in the amount of $396,579.11, plus 15% penalty in the amount of $59,486.91, total $456,066.32.

On August 20, 1956 assessee filed a petition for reassessment, objecting as follows:

'S. S. Kresge Company objects to the assessment in whole and to each and every item in said assessment. More particularly, S. S. Kresge Company objects to the Tax Commissioner's test checks (taken in 1956 and applied to 1952, 1953, 1954 and 1955), the percentages he indicates for each department in each of the 36 Kresge stores that were test checked and the resulting figures. The Commissioner took these percentages as indicative of sales under 41¢ and applied these percentages against the total sales of each department in each store to get an amount of sales under 41¢. Through his erroneous calculations, his tabulations of sales

under 41c were less than the amount reported by the Kresge Company and the Commissioner then made an assessment against the S-10 returns (for years 1952, 1953, 1954 and 1955) of 36 Kresge stores. S. S. Kresge Company objects to the test checks, each percentage used, the resultant figures obtained and to the assessment of each of the 36 stores. The amount of deficiency of each of the 36 stores is attached hereto and made a part of this Petition.

S. S. Kresge Company objects to the assessment for the following reasons:

1. The Commissioner's calculation are based on erroneous and false test checks and percentages and thus the assessment is not in accordance with provisions of Sections 5739.01 through 5739.99 of the Revised Code of Ohio.

2. S. S. Kresge Company did have adequate records within the meaning of Section 5739.10 of the Revised Code.

3. The Tax Commissioner's test checks do not meet the requirements set forth in Section 5739.10 of the Revised Code.

4. The Tax Commissioner made use of only part of the evidence available to him, when he should have used all evidence.

S. S. Kresge also requests that the entire penalty be remitted.'

This assessment is based upon test checks conducted in 36 of the assessee's 83 retail establishments in Ohio. Each of the 36 stores was checked for six consecutive days during either March, April or May 1956. Separate test checks were made in each of the departments which made taxable sales in each of the stores. The checks were made with the cooperation and assistance of the assessee's employees. The assessment is for liability incurred at the 36 stores checked. No effort has been made to apply the results of a test check to any store other than that store in which it was made.

Assessee's contention that the test check period is not representative of the assessee's business for the period covered by the assessment is not supported by evidence.

The contention that the calculations based on these test checks are erroneous in that the results do not agree with the returns filed by the assessee seem totally facetious. Obviously they do not agree or an assessment would not have been issued. Equally obvious, is the fact that the information contained in the assessee's returns was arrived at by computing backwards from the stamps cancelled. This procedure could give accurate results only if each and every clerk, in each of the various departments, in each of the 36 stores, cancelled the proper amount of prepaid tax receipts on each taxable sale. No evidence of such perfection has been submitted.

The assessee has failed to point out in what respect the Commissioner's calculations are erroneous or in what respect said test checks are false. In this connection it is noted that the data which comprises the test checks was compiled in the first instance, by assessee's employees. Assessee has failed to point out which of these employees, to whom it attributes perfection in the cancellation of prepaid tax receipts, is responsible for submitting data which renders these test checks to be false.

Although the assessee contends it had adequate records within the meaning of Section 5739.10, R. C.; it has not submitted such records, nor any evidence thereof.

As to the contention that the test checks do not meet the requirements of section 5739.10, R.C., it is found that said contention is not well founded.

Finally, the contention that the Commissioner made use of only a part of the evidence, apparently refers to what can only be described as a composite test check prepared by the assessee. This composite test check consists of a

combination of various daily test checks of individual departments of individual stores, in such a way as to total one week's operation of a single imaginary store. An examination reveals that the assessee has, in each instance, combined the minimum day of the minimum department of the minimum store. Thus, it arrives at a composite test check showing minimum liability. That such a proposition should be disregarded in favor of an actual test check of each store covered by the audit is obvious.

The assessee has failed to sustain any of the objections urged.

The petitioners request for the cancellation of the penalty is conditionally allowed as noted.

Therefore, it is the order of the Tax Commissioner that if payment of

	Assessment	Penalty	Total
(Sales)	$396,579.41	Canceled	$396,579.41

is made within thirty (30) days from date of receipt by the taxpayer of the journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals; to an appropriate Court of Appeals; or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

If the total amount is not paid as above provided, the assessment shall stand as issued in the following amount:

	Assessment	Penalty	Total
(Sales)	$396,579.41	$59,486.91	$456,066.32"

The audit period involved is January 1, 1952 through December 31, 1955.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript supplied

by the Tax Commissioner, the testimony and evidence presented to the Board of Tax Appeals at a hearing in Columbus, Ohio, and the briefs submitted by counsel.

In its notice of appeal the appellant says that the final order of the Tax Commissioner is erroneous in the following respects:

"1. The Tax Commissioner's calculations are based on erroneous test checks and percentages and thus the resulting assessment is in violation of and not in accordance with the provisions of Section 5739.01 to 5739.99, inclusive, of the Revised Code of Ohio.

2. The S. S. Kresge Co. did have adequate records (within the meaning of Section 5739.10, Revised Code) of receipts from its retail sales in excess of forty cents for the period covered by the assessment.

3. The Tax Commissioner's test checks (taken during March, April and May, 1956) were not representative of the semi-annual period in which they were taken (January 1, 1956 to June 30, 1956) because they were of insufficient duration and did not include the necessary factors and therefore the assessment is in violation of and not in accordance with the provisions of Section 5739.10, Revised Code.

4. The Tax Commissioner did not consider information, other than the test checks, relating to the sales made by the S. S. Kresge Co. during the assessment period (January 1, 1952 to December 31, 1955) and therefore the assessment is in violation of and not in accordance with the provisions of Section 5739.10, Revised Code.

5. The percentages of sales under 41c, as found in the March, April and May, 1956 test checks, were not representative of nor comparable to the S. S. Co.'s sales under 41c during the eight semi annual periods constituting the assessment because there were:

(a) Significant differences in the type of merchandise sold during the test-check periods (March, April and May, 1956) and that sold during the assessment period (January 1, 1952 to December 31, 1955).

(b) Significant differences in the prices of merchandise sold during the test-check periods (March, April and May, 1956) and that sold during the assessment period (January 1, 1952 to December 31, 1955).

(c) Significant changes in the S. S. Kresge Co.'s merchandising policy which indicate that Kresge's business during the test-check periods of March, April and May, 1956 was not comparable to nor representative of the semi-annual periods constituting the assessment period (January 1, 1952 - December 31, 1955)."

The appellant, S. S. Kresge Company, operated a number of variety stores in Ohio during the audit period, wherein were sold at retail the many items of tangible personal property usually found in such establishments.

The Tax Commissioner, being of the opinion that the taxpayer did not have the records required to be kept by a vendor under the provisions of Revised Code Section 5739.11 found that he could not audit appellant's business operations on a tax bracket basis to ascertain whether the taxes levied by Revised Code Section 5739.02 had been paid in full for the reason that the vendor did not have a complete and accurate record of each of its sales of taxable property, together with a record of the tax collected thereon.

The commissioner then proceeded to compute appellant's sales tax liability under the provisions of Revised Code Section 5739.10 by having a six-day test check made of each of appellant's 36 business operations involved herein. The test checks were made during the months of either March, April or May, 1956, and the purpose thereof was to determine the

proportion that appellant's taxable sales bore to its total retail sales in each of its 36 business locations.

Revised Code Section 5739.11 reads as follows:

"Each vendor shall keep complete and accurate records of sales of taxable property together with a record of the tax collected thereon, which shall be the amount due under sections 5739.01 to 5739.31, inclusive, of the Revised Code, and shall keep all invoices, bills of lading, and such other pertinent documents, in such form as the tax commissioner requires by regulation. Such records and other documents shall be open during business hours to the inspection of the commissioner, and shall be preserved for a period of four years, unless the commissioner shall, in writing, consent to their destruction within that period, or by order require that they be kept longer."

Revised Code Section 5739.10 reads as follows:

"In addition to the tax levied in section 5739.02 of the Revised Code, and to secure the same objectives specified in such section, there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per cent of the receipts derived from all such retail sales, except retail sales under forty-one cents and those to which the excise tax imposed by section 5739.02 of the Revised Code is made inapplicable by division (B) of said section. For the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under forty-one cents, and no assessment shall be made against any vendor for retail sales of less than forty-one cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than forty-one cents; provided that where a vendor does not have adequate records of receipts from his retail sales in excess of forty cents, the tax commissioner may refuse to accept the vendor's return, and upon the basis of test checks of the vendor's business for a representative period, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales. The tax imposed by this section shall

be determined by deducting from the sum representing three per cent of the receipts from such retail sales the amount of tax paid to the state by means of canceling prepaid tax receipts in accordance with section 5739.03 of the Revised Code. This section does not affect any duty of the vendor under sections 5739.01 to 5739.19, inclusive, and 5739.26 to 5739.31, inclusive, of the Revised Code, nor the liability of any consumer to pay any tax imposed by section 5739.02 of the Revised Code."

The appellant says that the entire assessment is invalid for the reason that the Tax Commissioner lacked statutory authority and power to make the assessment because of the requirements set out in Revised Code Section 5739.10. The appellant says that—

(1) It did have adequate records of receipts from retail sales in excess of forty cents;

(2) The test check used by appellee was not for a representative period; and

(3) The Tax Commissioner did not consider other information relating to appellant's sales when he computed the assessment.

The appellant says that if any one of the three factors noted is not satisfied the Tax Commissioner is deprived of his authority to make an assessment under the provisions of Revised Code Section 5739.10.

Kresge's procedure for recording sales, including sales over forty cents per unit sale, was described by Paul Murphy, appellant's assistant comptroller, as follows:

Each cash register in each store is supplied a bank of sales tax stamps, and stamps in the proper value are supposed to be cancelled whenever a sale in excess of forty cents is made. From the amount of stamps so cancelled the company is then able to compute its total taxable sales. Appellant's cash registers do not have tapes

and therefore there is no written record made of individual sales and only the amount of total sales can be ascertained by reading the register. Each store maintains monthly records of its sales broken down into taxable and nontaxable sales, as above noted, and at the end of each month the records are forwarded to the main office in Detroit, Michigan, where they are placed on permanent file. Appellant's witness says that a constant supervisory check is carried on by the company to assure that stamps are cancelled in the correct sums. He further states that Kresge observes the same precautions for the collection of the tax and the cancellation of the stamps as it does for its own business affairs, including the handling of cash and ringing of the registers. For this and other reasons the appellant is of the view that it did have "adequate" records of receipts from retail sales in excess of forty cents made during the audit period.

The Board of Tax Appeals cannot concur in this view. We believe that the use of the words "adequate records" in Revised Code Section 5739.10 means records that are adequate for the Tax Commissioner to audit and examine to ascertain if the sales taxes which should have been charged actually were charged and collected by the vendor and have been returned to the treasury of the State of Ohio. Obviously, a vendor, in most cases, keeps the records which he considers adquate for his own business purposes and is not particularly concerned as to whether they are adequate to establish tax liability. But we are here concerned with a tax statute which must be read in pari materia with the provisions of other sections of the Ohio sales tax law including those portions of Revised Code Sections 5739.01 and 5739.02, which read as follows:

Section 5739.01—

" * * *

The tax collected by the vendor from the consumer under sections 5739.01 to 5739.31, inclusive, of the Revised Code, is not part of the price, but is a tax collection for the benefit of the state, and except for the discount authorized in section 5739.07 of the Revised Code, no person other than the state shall derive any benefit from the collection or payment of such tax. * * *."

Section 5739.02—

" * * *

For the purpose of the proper administration of sections 5739.01 to 5739.31, inclusive, of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established. * * *."

The Board of Tax Appeals is also cognizant of the reasoning used by the Supreme Court of Ohio in the case of Obert v. Evatt, 144 Ohio State Reports at page 492, wherein the first three branches of the syllabi read as follows:

"1. Section 5546-12a, General Code is supplementary to Section 5546-9a, General Code, and provides a means whereby the bracket taxes imposed by Section 5546-2, General Code, may be recovered for the state treasury from a vendor in cases where the vendor failed to keep the records required to be kept by Section 5546-12, General Code, or because of the nature of vendor's business it is impractical for him to keep such records.

"2. Where a vendor liable under Section 5546-12a, General Code, claims that the Tax Commissioner in making an assessment by virtue of Section 5546-9a, General Code (as amended 116 Ohio Laws, pt. 2, 329, 117 Ohio Laws, 763, and 119 Ohio Laws, 45), has made insufficient allowance for tax-exempt sales the burden of proof rests upon such vendor.

"3. Where the amount of vendor's gross receipts from sales are known, the burden rests upon such vendor to show what part, if any, of such receipts resulted from sales of tax-exempt merchandise."

In his brief the appellee has this to say on the subject:

"The stamp cancellation method in the S. S. Kresge stores works this way:

The cash registers do not have tapes which record the individual sales by amount and by tax thereon but are metered registers which record the cumulative total of cash including sales tax which has passed through that department. The clerk also has a bank of tax stamps which are to be cancelled as taxable sales occur. At the end of a given period the amount of stamps remaining in the bank is subtracted from the original amount. The difference is then divided by 3% to arrive at the cumulative dollar value of taxable sales. For instance, if the cumulative total on a metered register showed $2,682.38, and the sales tax stamp bank had been depleted by $63.03, the S. S. Kresge Company would divide 3% into $63.03, which equals $2,101.00, to find how much of the $2,682.38 should be reported as attributable to taxable sales. If $80.47 had actually been collected in sales tax there would be no way possible for this discrepancy to show up, for the metered register records only the total amount without segregating sales tax. The appellant starts with the answer it wants, the amount of sales tax stamps cancelled, and figures backward to find the dollar value of taxable sales to report—which information multiplied by 3% will exactly equal the amount of stamps cancelled. As we have stated above, this method supplies the question for every answer. In view of the above considerations, can the stamp cancellation method of recording the sales of taxable property seriously be called 'adequate?' The answer is most obvious. How could any system which admits of no auditing or even cursory inspection be considered adequate? Section 5739.10, Revised Code, provides in substance that each vendor must maintain adequate records of receipts from retail taxable sales. The stamp cancellation method records no data whatsoever as to receipts; moreover, it completely conceals how much tax should have been collected. It precludes any check on how much tax should have been collected. In fact, the only thing it does reveal is how many tax stamps were cancelled regardless of tax collected, or not collected.'"

From the above, and from the fact that appellant's own witnesses estimate that appellant owes substantial sales tax for the audit period, it would seem apparent that this first claim of appellant lacks substance.

Appellant's claim that the test check was not for a representative period is also found to be without merit. Under appellant's theory, the test check authorized by Revised Code Section 5739.10 is valid only for the particular day involved in the test check. If such theory be the law then the Tax Commissioner would be required to conduct constant test checks on those vendors not maintaining adequate records of receipts from taxable sales. We do not believe that the legislature, by the language it used in Revised Code Section 5739.10, intended that a constant test check be made because the burden of making such a test check would undoubtedly be a greater burden on the vendor than the burden of keeping adequate records of its receipts from taxable sales. We believe that the six-day test check for the non-holiday period involved herein constituted a valid test check for a representative period of appellant's variety store businesses, under the provisions of Revised Code Section 5739.10.

Appellants' claim that the Tax Commissioner did not consider other information relating to appellant's sales is not denied by the Tax Commissioner and, from the record before us, we are unable to find that any competent and relevant evidence thereon was ever presented by appellant to the Tax Commissioner for his consideration. We do not believe that such a failure on the part of a vendor can deprive the Tax Commissioner of his assessment power under the statute. If the vendor felt that it had competent and relevant evidence which could be used by the Tax Commissioner it should have presented it to him for his consideration.

We cannot agree with the appellant that the reasoning used by the Supreme Court of Ohio in the case of The Mannen & Roth Co., v. Peck, 161 Ohio State Reports at page 153, would lead to the conclusion that the Tax Commissioner was without power to make the subject assessment since he did not consider other information relating to appellant's sales. We hold that the commissioner had the power and authority to make the assessment and that the vendor, upon appeal, has the right to present to the Board of Tax Appeals the evidence it probably should have presented to the Tax Commissioner. See Bloch v. Glander, 151 Ohio State Reports at page 381 and Jones, D.B.A. Tennessee Barbecue v. Glander, 150 Ohio State Reports at page 192.

Appellant, before the Board of Tax Appeals, presented two competent expert witnesses, Professor Malcolm P. McNair of Harvard University and Theodore N. Beckman of Ohio State University. These witnesses testified at length concerning the additional information relating to the sales made by appellant during the audit period that they believed should be considered by this Board, in connection with the Tax Commissioner's test checks, to determine the proportion that appellant's taxable sales in each of its stores here under consideration bore to all its retail sales in each store, during the audit period.

Testimony and evidence was introduced to show that the test check made in 1956 could not be used as an accurate gauge to determine appellant's taxable sales made during the years 1952, 1953, 1954 and 1955, because in the year 1956 the impact of appellant's policy "trading up" would distort the test check figures to such an extent that they would be useless for the purpose for which intended.

"Trading up" may be three different kinds:

(1) The addition of merchandise of the same general type, but of a higher price and better quality - Exhibit HHH.

An illustration of this type of trading up is when a store selling neckties for 29 cents, 39 cents and 59 cents adds a necktie line priced $1.19, $1.39 or $1.49.

(2) The expansion of traditional merchandise lines by the addition of higher level higher priced merchandise of a different type but in the same general category - Exhibit HH-2.

An illustration of this type of trading up is when a store which has been selling house (work) dresses for $3.98, begins selling street (dress-up) dresses for $14.95 or $17.95.

(3) The introduction of entirely new lines of higher priced merchandise not previously handled, such as power mowers, record players, and appliances - Exhibits HH-3 and HH-4.

Witness Beckman made a search of Kresge's newspaper advertisements run by the 36 stores under assessment throughout the four years involved and he concluded that the 36 stores tested had traded up in the three ways indicated. His conclusion is demonstrated by Exhibit J, "Summary of Items of Merchandise on Sale on Regular Checking Sheets, 1952 through 1956." The "Regular Checking Sheets" are lists of goods which every store in the Kresge group is obligated to carry in stock for sale, and such goods represents seventy to seventy-five per cent of annual sales volume during the assessment period. Mr. Andrew Barr, of Price Waterhouse, testified for the appellant concerning the import of Exhibit J, and he stated from his study of the exhibit that the increased number of items over forty cents offered for sale between 1952 and 1956 was easily apparent—that the increase from 1952 to 1956 was "very very substantial," that from 1953 to 1956 it was "very substantial" and that from 1954 to 1956, and from 1955 to 1956 the increases were "substantial."

Exhibit J demonstrates the extent of the trading up engaged in by Kresge. In 1952 there were no items selling in excess of $5.00; however, during 1956 (the year of the test checks) there were 102 items selling in excess of $5.00, including two items over $25.00. The effect upon the percentage of sales under forty cents of a company which is selling these items for the first time is obvious, according to the witnesses of appellant. The number of items selling under forty-one cents increased only 22.85% between 1952 and 1956, whereas the number of items selling for over forty cents increased 111.78%. The exhibits presented by appellant and the testimony of the witnesses indicate that the test checks taken in 1956, in and of themselves, did not accurately reflect Kresge's sales under forty-one cents during the years 1952, 1953, 1954 and 1955.

Witness McNair testified that on the basis of the various exhibits, and upon his study of the matter in issue, he would compute appellant's sales tax liability for the audit period at $49,061 (appellant's Exhibit V record page 320) and witness Beckman testified that he would find a deficiency of $35,833.71.

Appellee's counsel, in his brief, states that appellant has assumed, rather than proved, the following three facts in order to manufacture a maximum amount of tax relief:

(1) That all increases by "trading up" in the number of taxable items over the four-year period were increases from the category of nontaxable items.

(2) That the sales of all items listed, or assumed to have been listed, at any time in the nontaxable category were sold in individual lots, thus ignoring the tax consequences of multiple sales of items individually taxable.

(3) That such individually nontaxable items were never sold as tie-in sales with taxable items making both taxable.

Appellee's counsel, in his brief, also quotes in full the decision of the Court of Appeals of New York in the case of W. T. Grant Company v. Lazarus Joseph, as Comptroller of the City of New York, reported in 2 New York (2d), 196. He maintains that the reasoning used in that case is dispositive of the argument used by the appellant in the instant case.

The appellee presented as witnesses the examiners who made the audit. These witnesses were not qualified as experts and could only testify as to the mechanics used in the test checks and in the computation of the assessment. In this connection, however, it should be noted that the examiners' work and opinions are only incidentally under review, and we are here concerned primarily with the correctness or incorrectness of the final order of the Tax Commissioner.

We are aware that any conclusion reached by this Board in arriving at a deficiency assessment figure would, of necessity, have to be based on speculation or inference. This has already been demonstrated by the Tax Commissioner's assessment figure of $396,579.41, witness McNair's figure of $49,061.00, and witness Beckman's figure of $35,833.71.

We also know that this matter would not be before us for consideration if the appellant had kept a record of its taxable sales and the sales taxes levied thereon, as provided by Revised Code Sections 5739.11 and 5739.02, in which event no speculation or inference would be involved in a determination of appellant's sales tax liability. Not having kept such records which are capable of verification as to taxable sales, the appellant, of its own choice, necessarily chooses Section 5739.10, Revised Code, as the one upon which its sales tax liability shall be determined; and, obviously, when the vendor relies upon this section it has a most difficult task in proving that unless consideration is given to certain

inferences and theories the assessment would not be considerably reduced.

We believe that appellant's two main witnesses are experts in their field and that their testimony and theories are entitled to great respect. However, this Board is not bound to accept the opinion of experts employed by a vendor even though it has little or no testimony before it. In this connection see Higbee v. Evatt, Tax Commr., 140 Ohio St., at page 325, 332, wherein it is said:

> "The burden is upon the taxpayer to prove his right to a deduction and he is not entitled to the full amount of deduction claimed merely because no evidence is adduced contra his claim."

We might also paraphrase what was said by the Supreme Court of Ohio in the case of Citizens Building Company v. Cuyahoga County Board of Revision, 141 Ohio St., 47, at page 51, as follows:

> The opinion stated by appellant's expert witnesses necessarily depended upon the methods used and their assumptions with which they started their inquiry determined in great measure the conclusions they reached.
>
> The Board of Tax Appeals is not required to adopt the opinion advanced by any expert, but is required to consider the opinion together with all other testimony and evidence which is competent and relevant to the issue.

To point up the situation, it is noted that each of appellant's witnesses produced a different answer and, no doubt, if a third witness had been employed he would have testified with still a third answer.

We realize that some of the evidence submitted is valid, but must also conclude that a considerable amount of testimony is purely speculative. For instance, witness Beckman's testimony, which is comprehensive and in great

detail, leaves much to be desired factually. Although his testimony is, in part, based on facts, most of it is based upon statistics, percentages, inferences and hypotheses and his conclusions are incapable of verification. The appellant has presented no testimony as to the specific number of individual items sold within particular tax brackets during the audit period. Not having before us the specific number of items in each category which were sold within the various tax brackets, it appears that it is not possible for us to develop an absolute figure of appellant's tax liability. We conclude that since appellant has failed to furnish this vital information, it has therein failed to sustain the burden of proving that the final order of the Tax Commissioner is erroneous, illegal or unreasonable.

The entire case submitted by the appellant actually rests upon the hypothesis that no matter what the frequency or type of sales in any department of any of its stores, meaning the cost of individual purchases of taxable merchandise costing more than 40¢, there is due the State of Ohio 3¢ for every dollar taken in on any day or longer period calculated from the gross sales of taxable merchandise for such period.

The fact is that a customer cannot, by any combination of figures, pay less than a 3% tax on a purchase costing more than 40¢. Referring to appellant's Exhibit J, it is obvious that there would be innumerable instances when the cost of a particular item or items of purchase falls into a tax bracket whereby actually more than 3% must be paid.

When the customer pays the tax he or she has a right to believe that such tax will be forwarded to the State of Ohio. This was certainly the intent of the legislature when Section 5739.11, Revised Code, was enacted to provide that a record be kept of taxable sales and the tax collected thereon. Here is the assurance to the customer-taxpayer, who pays

the tax, that the State of Ohio shall have the benefit of the tax. The hypothesis of the appellant's case cannot be and is not accepted by this Board. The burden of proof has not been sustained either by showing the assessment to be unreasonable or contrary to law or that any modification should be made.

The evidence offered by the appellant as to the effect of any upgrading or increase in prices upon the assessment is based upon the same theory and reasoning employed by the appellant in its argument that the Tax Commissioner had no right to refuse the appellant's tax returns in the first instance; that the Tax Commissioner had no right or authority to conduct the audit and the test check; and that the Commissioner had no right or authority to make an assessment.

A modification of a final order of assessment by the Tax Commissioner must be based upon information consisting of competent evidence upon which may be calculated in dollars and cents the relationship between the benefit of the information as it applies to the final order of assessment.

This Board rejects any theory of calculation of the percentage of taxable merchandise selling for more than 40¢ as related to the gross sales of taxable merchandise that does not include factors and information regarding the number of items sold and the tax bracket into which the sales fell, if they were subject to tax.

Upon consideration of all the evidence presented, including the record, the transcript of the Tax Commissioner, and the briefs of counsel, we conclude (1) that the appellant did not maintain an adequate record of taxable sales and the tax collected thereon, as provided by the Ohio Sales Tax Act; (2) that the period used by the Tax Commissioner for the test check did constitute a representative period; and

(3) the appellant, by the information it furnished to us relative to its retail sales, did not sustain the burden of proof imposed upon it by law, as described in Obert v. Evatt, 144 Ohio St., at page 492; and that, therefore, the Tax Commissioner's order must be affirmed.

It is, therefore, the order of the Board of Tax Appeals that the assessment heretofore made by the Tax Commissioner on which this appeal is based must be, and the same hereby is, affirmed.

APPENDIX III

1. The Board of Tax Appeals of Ohio is an administrative agency and is without jurisdiction to determine the constitutional validity of a statute.
2. Such constitutional question may be raised in this court although not previously raised before the Board of Tax Appeals.
3. Under the provisions of Section 5739.10, Revised Code, the Tax Commissioner may, in the absence of adequate records of a vendor, determine the proportion that such vendor's taxable retail sales bear to all his retail sales by making test checks of the vendor's business for a representative period, and on other information relating to such sales. (*Obert v. Evatt, Tax Commr.*, 144 Ohio St., 492, approved and followed.)
4. Such provisions of Section 5739.10, Revised Code, are not violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting the taking of property without due process of law.

(No. 36124—Decided March 23, 1960.)

Appeal from the Board of Tax Appeals.

On February 21, 1958, the Tax Commissioner of Ohio issued a sales tax assessment against the appellant S. S.

Kresge Company for the period of four years beginning January 1, 1952, and ending December 31, 1955, for retail sales in amounts exceeding 40 cents.

The assessment issued by the Tax Commissioner was affirmed by the Board of Tax Appeals.

An appeal has been perfected to this court on the ground that the assessment is unreasonable and unlawful.

Mr. Carlton S. Dargusch, *Mr. Carton S. Dargusch Jr.*, and *Mr. Jack H. Bertsch*, for appellant.

Mr. Mark McElroy, attorney general, *Mr. Joseph D. Karam* and *Mr. Robert J. Kosydar*, for appellee.

Opinion, per WEYGANDT, C. J.

WEYGANDT, C.J. As already noted, this controversy is limited to sales in amounts in excess of 40 cents.

Amended Section 5739.10, Revised Code, reads in part as follows:

"For the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under 41 cents, and no assessment shall be made against any vendor for retail sales of less than 41 cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than 41 cents; provided that where a vendor does not have adequate records of receipts from his retail sales in excess of 40 cents, the Tax Commissioner may refuse to accept the vendor's return, and upon the basis of test checks of the vendor's business for a representative period, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales."

And Section 5739.11, Revised Code, reads:

"Each vendor shall keep complete and accurate records of sales of taxable property, together with a record of the

tax collected thereon, which shall be the amount due under Section 5739.01 to 5739.31, inclusive, of the Revised Code, and shall keep all invoices, bills of lading, retained parts of prepaid tax receipts, and such other pertinent documents, in such form as the Tax Commissioner requires by regulation. Such records and other documents shall be open during business hours to the inspection of the commissioner, and shall be preserved for a period of four years, unless the commissioner shall, in writing, consent to their destruction within that period, or by order require that they be kept longer."

The appellant questions the constitutionality of Section 5739.10, Revised Code, on the grounds that the appellant is deprived of its property without due process of law because of misconstruction and misapplication of the statutory provisions, and because an irrebuttable presumption of the validity of the test checks is thereby created, all in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The appellee denies the unconstitutionality of the statute and also insists that this question can not be raised here inasmuch as it was raised before the Board of Tax Appeals. The latter contention can not be sustained inasmuch as the Board of Tax Appeals, being an administrative agency and not a court, was without jurisdiction to consider and determine a question of constitutional validity. Hence, nothing could have been accomplished by raising the question there. *East Ohio Gas Co.* v. *Public Utilities Commission*, 137 Ohio St., 225, 28 N.E. (2d), 599.

The question of the validity of the various test checks disappears when it is observed that they were made at each of 36 of the appellant's stores and in each department thereof for six-day periods in the manner, at the stores and at times suggested by the appellant itself. Under these circum-

stances the appellant can not be heard to complain that the statutory requirement for "a representative period" was not met duly and fairly. Especially is this true when it is noted that each test was applied to that store alone and to no other.

Another of the appellant's complaints is that the Board of Tax Appeals was in error in finding that the appellant had failed to maintain adequate records of sales in excess of 40 cents within the meaning of Section 5739.10, Revised Code.

The record discloses that the appellant did not maintain register tapes or keep sales slips. The Board of Tax Appeals describes the appellant's procedure as follows:

"Each cash register in each store is supplied a bank of sales tax stamps, and stamps in the proper value are supposed to be cancelled whenever a sale in excess of 40 cents is made. From the amount of stamps so cancelled the company is then able to compute its total taxable sales. Appellant's cash registers do not have tapes and therefore there is no written record made of individual sales and only the amount of total sales can be ascertained by reading the register. Each store maintains monthly records of its sales broken down into taxable and nontaxable sales, as above noted, and at the end of each month the records are forwarded to the main office in Detroit, Michigan, where they are placed on permanent file. Appellant's witness says that a constant supervisory check is carried on by the company to assure that stamps are cancelled in the correct sums. He further states that Kresge observes the same precautions for the collection of the tax and cancellation of the stamps as it does for its own business affairs, including the handling of cash and ringing of the registers. For this and other reasons the appellant is of the view that it did have 'adequate' records of receipts from retail sales in excess of 40 cents made during the audit period."

"The Board of Tax Appeals can not concur in this view. We believe that the use of words 'adequate records' in Revised Code Section 5739.10 means records that are adequate for the Tax Commissioner to audit and examine to ascertain if the sales tax which should have been charged actually were charged and collected by the vendor and have been returned to the treasury of the state of Ohio. Obviously, a vendor, in most cases, keeps the records which he considers adequate for his own business purposes and is not particularly concerned as to whether they are adequate to establish tax liability. But we are here concerned with a tax statute which must be read *in pari materia* with the provisions of other sections of the Ohio sales tax law including those portions of Revised Code Sections 5739.01 and 5739.02 which read as follows:

"Section 5739.01—

"* * * *

"The tax collected by the vendor from the consumer under Sections 5739.01 to 5739.31, inclusive, of the Revised Code, is not part of the price, but is a tax collection for the benefit of the state, and except for the discount authorized in Section 5739.07 of the Revised Code, no person other than the state shall derive any benefit from the collection or payment of such tax. * * *

"Section 5739.02—

"* * * *

"'For the purpose of the proper administration of Sections 5739.01 to 5739.31, inclusive, of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established. * * *"

"The Board of Tax Appeals is also cognizant of the reasoning used by the Supreme Court of Ohio in the case of

Obert v. *Evatt*, 144 Ohio State Reports at page 492, where the first three branches of the syllabus read as follows:

"'1. Section 5546-12*a*, General Code, is supplementary to Section 5546-9*a*, General Code, and provides a means whereby the bracket taxes imposed by Section 5546-2, General Code, may be recovered for the state treasury from a vendor in cases where the vendor failed to keep the records required to be kept by Section 5546-12, General Code, or because of the nature of vendor's business it is impracticable for him to keep such records.

"'2. Where a vendor liable under Section 5546-12*a*, General Code, claims that the Tax Commissioner in making an assessment by virtue of Section 5546-9*a*, General Code (as amended, 116 Ohio Laws, pt 2, 329, 117 Ohio Laws, 763, and 119 Ohio Laws, 45), has made an insufficient allowance for tax-exempt sales, the burden of proof rests upon such vendor.

"'3. Where the amount of vendor's gross receipts from sales are known, the burden rests upon such vendor to show what part, if any, of such receipts resulted from sales of tax-exempt merchandise.'"

The conclusion of the Board of Tax Appeals aptly reads in part as follows:

"We also know that this matter would not be before us for consideration if the appellant had kept a record of its taxable sales and the sales taxes levied thereon, as provided by Revised Code Sections 5739.11 and 5739.02, in which event no speculation or inference would be involved in a determination of appellant's sales tax liability. Not having kept such records which are capable of verification as to taxable sales, the appellant, of its own choice, necessarily chooses Section 5739.10, Revised Code, as the one upon which its sales tax liability shall be determined

"* * * "

"Upon consideration of all the evidence presented, including the record, transcript of the Tax Commissioner, and the briefs of counsel, we conclude (1) that the appellant did not maintain an adequate record of taxable sales and the tax collected thereon, as provided by the Ohio Sales Tax Act; (2) that the period used by the Tax Commissioner for the test check did constitute a representative period; and (3) the appellant, by the information it furnished to us relative to its retail sales, did not sustain the burden of proof imposed upon it by law, as described in *Obert* v. *Evatt*, 144 Ohio St., at page 492; and that, therefore, the Tax Commissioner's order must be affirmed."

Statement of the Case.

Consistent with these views, this court finds that the decision of the Board of Tax Appeals is neither unreasonable nor unlawful. Hence, the decision of the board is affirmed.

Decision affirmed.

ZIMMERMAN, MATTHIAS, BELL, HERBERT and PECK, JJ., concur.

APPENDIX IV

Examiner's Confidential Remarks and Special Explanations

The S. S. Kresge Company with General Offices located at 2727 Second Avenue, Detroit, Michigan operates a chain of variety stores throughout the United States and at the time of this audit had eighty-three (83) stores in operation in the State of Ohio. Attached to ST Form 807-B, Inspection Report, in the audit is a list of the individual Ohio stores.

Mr. P. M. Murphy, Assistant Comptroller, of the company was initially contacted in August of 1955 and all matters pertaining to this audit were discussed and handled

through Mr. P. M. Murphy, Mr. William Harrington, Assistant Manager of the Tax Department, and also Attorney Carlton S. Dargusch, Jr. who was employed as legal counsel to represent the company in the conduction of this audit.

The audit covers the period of 1-1-52 to 12-31-55 and includes individual audits for only thirty-six (36) store operations for reasons to be stated later. The procedures and methods of computation employed in the individual audits are similar and thus explanations stated will pertain to all stores.

The examination of the company's records was made at the General Offices in Detroit, Michigan. A consolidated ST-10 return is filed to cover sales made from all Ohio operations during the period and supporting schedules attached listing Prepaid Tax Receipts purchased and cancelled and also refunds for which claims were filed for each store. It was explained to the examiners by Mr. Murphy how information reported on the ST-10 Return was obtained. The sales as reported are net sales and are obtained from the Daily Cash Register Record (Exhibit A) filed by each store. Sales tax and refunds are deleted to arrive at the net sales figure. Sales exempt by character and sales made to religious and charitable organizations are obtained from a monthly report, Exhibit B, filed by each store. These sales when made are tallied at the counter by the sales clerk.

To arrive at the amount of sales over 40 cents the stamp cancellation method is employed. The amount of prepaid tax receipts cancelled by the sales clerk at each register determines the amount of sales tax collected. This data is also obtained from a monthly report (Exhibit C) filed by each store. Thus in instances where the sales clerk collects the sales tax but fails to cancel the prepaid tax receipts, the sales tax collected eventually will not be re-

ported. As a result, the amount of taxable sales reported was the matter in question. In analyzing the ST-10 returns filed, it was found that approximately fifty-five percent (55%) of total sales was being reported as taxable which in comparison with other similar variety chain operation reports appeared to be low. This seemed to indicate that the clerks were failing to cancel prepaid tax receipts on a great percentage of taxable sales being made.

In view of this situation and the fact that the amount of taxable sales reported was being questioned, examiners requested the company to conduct a test check in each store for a representative period. This brought on numerous problems as it was the interest of the department to conduct test checks without disrupting the normal operation of the stores.

First the departmental sales record was used for the purpose of this audit for the reason that such a variety of commodities is sold and the volume of sales in the departments varies considerably. Thus, by establishing a percentage ratio that taxable sales bears to gross sales for each department, the volume of sales in any one particular department would not control an overall percentage. This is especially true in this type of operation as a sizeable amount of merchandise sold is seasonal. Consequently, it would be difficult to select a representative period to test check if an over-all percentage was used. By applying a percentage ratio to each respective department the weight of taxable and exempt sale is distributed proportionately to the departments where the volume of sales is either large or small.

In attempting to establish a taxable percentage for each department, Attorney Carlton Dargusch proposed a method of test checking whereby they would select several departments from each store to test check. Each department

was to be tested for a total of nine days by a minimum of three stores and a maximum of six different stores. No one store was to test less than one full day nor more than three days. The store and department to be checked was left entirely up to the supervisor of the S. S. Kresge Company who had charge of the district in which the stores were located. At the outset, the examiners were rather dubious about the propriety of applying the results of a check in one store against sales made in another store. But since a check of this nature would greatly facilitate the completion of the audit, which as can be noted is tremendous in scope, and because of the fact that we considered this to be the only method of test checking with which the S. S. Kresge Company would cooperate, we decided to give it a try. And then only because Attorney Dargusch led us to believe that the result of this check would be acceptable against every department in every store.

Since the examiners were not apprized of the stores to be checked or the departments to be checked in the stores, an investigation of all the stores in a 70 mile radius of Youngstown was conducted. During our investigation we learned that in each store, where departments were being tested, the check was for a six day period. The results we obtained were on a selective basis. For example, where a department was checked in three different stores, all covering a period of six days; the data we obtained was only for a nine day period. The checks were sent from the stores to the Detroit office where they were screened and from the total days checked the worst possible nine day results were forwarded here to the Youngstown Sales Tax office. This fact was substantiated through our investigation. All the stores visited and the departments checked were noted and compared with the results sent from Detroit. Many of the stores, where the taxable percentages were running high

were not included in the check submitted to us. To apply the percentages obtained against some of the stores would show an over-cancellation; this appeared to be highly improbable since the taxable sales were established to a great degree, by the stamp cancellation method. All these things considered it was decided that the test check would not serve the purpose.

This necessitated the pursuit of our intended original method of testing each store by departments. The test check in the store was supervised by at least one examiner in each store. The procedure of checking was as follows: Tally sheets were placed at each register every day of the test check period. Each tally sheet contained the cash register number, the department the register was assigned to, the store number, date, and type of sales tallied on the sheet. All sales over 40 cents, which were subject to the sales tax, were tallied in columns so designated; this method was similarly followed for sales of taxable merchandise made in individual amounts of less than 41 cents. The sales over 40 cents tallied included the tax. This tax was eliminated on the sheets bearing the letter (E) in the audit, titled Recap. of Test Check by Departments. Where Federal Excise Tax was charged, the amount of the tax was not included in the tally made on the cash register tally sheet. Since the vendor had an actual record of sales exempt by character of items and sales made on exemption, separate tally sheets were provided for these types of sales, so that they would not affect the taxable percentage. Had we allowed them to be tallied in the exempt column this in effect would have given the vendor double credit. At the end of each day these tally sheets were tabulated by a responsible store employee and the totals were entered on summary sheets. The examiner in each store obtained these sheets, and from them made up the test check work

sheets. It is well to note here that the tallied sales did a
always agree with the daily register readings. This w
due to the fact that the girls failed to tally all the sal
Not being able to determine whether the omitted sales we
taxable or exempt the examiners assumed they were ma
in the same proportion as the tallied sales.

This audit covers only thirty six (36) out of some eigh
three (83) S. S. Kresge stores located in Ohio. The reaso
for this are that it took the vendor considerable time to g
a store ready for checking. The supervisors and sto
manager had to be oriented and they in turn had to ori
the store personnel. Also department personnel were st
tioned in each store being tested for entire period of t
check. This was done to assist the vendor in completi
the check and in order to obtain the most nearly accura
results.

The stores that were test checked were selected firs
because they had maintained a departmental record syste
of accounting, approximately forty (40) of the unchecke
stores have discontinued this method as of the Fall of 195
secondly, in analyzing the stamp cancellation to volume
gross sales, we attempted to select the stores we believ
to be most deficient, but it does not follow that the stor
selected are the most deficient as there are many variab
factors which can alter the final results. For example, o
such factor would be where the bulk of the sales are
wearing apparel departments, which, in all instances car
high taxable percentages. Although it is the opinion
the examiners that the test check produced representativ
results to a large degree, it would be well to consider tha
twenty-five percent of the company's total yearly sal
are made during the Christmas season, the months of N
vember and December and that a check made during th
period would almost definitely result in a higher taxab

percentage in departments such as greetings cards, toys and games, electric, and gift wrap, etc.

Audit Procedure Outline

Test Check by Departments:

This work sheet consists of daily departmental cash register numbers and each department that the register was assigned to. The tallied sales over forty cents (40c) including sales tax and tallied sales under forty one cents (41c) are shown daily to arrive at the total sales over forty cents and under forty one cents for the week that the test check was conducted. Where a register number is repeated on this work sheet this is due to sales being rung up on this register and charged to various departments.

Recap. of Test Check by Departments:

This work sheet consists of weekly tallied sales shown in (column 1) as sales over forty cents (40c) including sales tax and (column 3) sales under forty one cents (41c) as taken from work sheet (Test Check by Departments).

Column (2) is sales over forty cents (40c) excluding sales tax by dividing column (1) by 103 percent.

Column (4) is total sales excluding sales tax by adding column (2) and column (3).

Column (5) is the percentage of sales over forty cents and is computed by dividing total sales into detaxed sales over forty cents, column (2).

Column (6) is the percentage of sales under forty one cents and is computed by dividing total sales column (4) into sales under forty one cents (column (3).

Vendor's Record of Exempt Sales:

This work sheet shows the vendors record of yearly exempt sales by classification of food, services, feeds and seeds, and sales on exemption certificates. Exempt food

sales consists of candy, delicatessen, low gross concessions (cut-up poultry) and food off the premises. Food off the premises was computed by crediting candy, delicatessen and low gross concessions as being one hundred (100) per-cent exempt (as shown on computation of sales work sheet) and the remainder, if any, was credited as food off the premises.

Where the vendors record of exempt food sales was not sufficient to cover candy, delicatessen and low gross concession no credit for food off the premises was allowed. It was the intent of the examiners to allow only credit that was claimed by the vendors own records. It was noted that certain stores did not take full credit for exempt candy, delicatessen and low gross sales and an adjustment was made to treat all sales made in these departments as exempt.

Exempt Services:

Scales were coin operated weighing machines and the remainder was credited to Department 45 (Concessions) which covered Beauty Parlors and Mechanical Rides.

Exempt Feeds and Seeds Sales: Department 43 (Horticulture) and 44 (Pets and Supplies) were combined to allow full credit for exempt feeds and seeds sales as it was impossible to determine what amount was made from each respective departments.

Sales on exemptions were credited to Total Audit Period Sales (as shown on Summary of Sales worksheet) as it was impossible to determine from what department these sales were made.

Computation of Sales: This work sheet shows the vendors yearly departmental sales for the audit period (Column 1 thru 5). The exempt sales by character are deducted from total audit period sales (Column 6) to arrive at sales

of taxable merchandise (Column 7). Percentage of sales under forty one cents (Column 8) and percentage of sales over forty cents derived from the test check (Column 10) are applied to sales of taxable merchandise to arrive at sales under forty one cents (Column 9) and sales over forty cents (Column 11) for the audit period.

Departments 32 (Gift Wrap & Party Goods) and 54 (Ribbons) were combined in the audit (on the Computation of Sales work sheet) due to a change in these departments. During 1952, 1953 and 1954 these departments were kept separately, but during 1955 Ribbons and Gift Wrap were recorded as one department.

Store numbers 223, 376 and 603 did not have complete departmental records for the audit period and for this reason had to be set up on a pro-rated basis for the audit period sales. The procedure used to arrive at departmental sales for the audit period is as follows: Departmental sales that were available were used and the percentage that each department bears to total sales was applied against total audit period sales to arrive at the departmental sales for the audit period.

Summary of Sales: This work sheet shows vendors yearly departmental sales. The returned merchandise on which refunds were made were added to total departmental sales to arrive at the gross sales figure for the audit period since it was impossible to determine the PTR's on which credit was taken for returned merchandise, and therefore the full amount of credit for PTR purchases and credit memos was given.

Sales exempt by character, sales under forty one cents and sales on exemption were deducted from gross sales to arrive at net taxable sales for the audit period taken to ST Form 807, Line 25.

The objection raised by the vendor's counsel to this audit was that a test check would not be representative of the early years of the audit. He contends that the vendor's own method of stamp cancellation has shown a steady increase of taxable sales. Consequently he proposed that if the test check showed an increase over the last reported percentage on the sales tax return, that percentage should be added to the reported taxable sales of each preceding return and compute the deficiency on that basis.

The examiners contention on this matter is that the reason for the large increase in stamp cancellation is due to the fact that this audit was being made. This point can be observed by analyzing the volume of sales made in 1951 with the cancellation as compared with the volume of sales against stamp cancellation in 1955. The sales showed a little decrease but the cancellation was up approximately ten (10) percent. Another point of rebuttal is that a few of the store managers were contacted and questioned as to their opinion about the volume of sales under forty one (41) cents as compared to total sales now and in 1952. The managers opined that their was not much change, if any, although there are items which sell for over forty (40) cents now which sold for less than forty one (41) cents in 1952 this condition is off-set by items which sold for five (5) cents and ten (10) cents which now sell for twenty (25) cents. Some managers say that they can't make any money on items selling for less than twenty five (25) cents and try to keep these at a minimum.

One observation was made that since commencing this audit the purchasing of prepaid tax receipts by the S. S. Kresge Company has steadily increased even though no noticeable changes have taken place in the operations.

APPENDIX V

Inter-Office Communication

Under separate cover we sent you all of our work sheets pertaining to the S. S. Kresge Co. audit. The work sheets were put in folders and on the front of each folder we made an effort to identify the contents therein.

In order to familiarize yourself with the events leading up to the completion of this audit, perhaps a brief explanation would be in order.

During the period covered by the audit, the S. S. Kresge Co. operated 83 retail outlets within the State of Ohio. Our audit includes only 36 of these stores. One of the reasons why we did not check all of the S. S. Kresge Co. stores was, we decided to first check only the stores who kept a departmental record of their sales and approximately 40 of the unchecked stores discontinued this method on or about September, 1954. Secondly, we attempted to select the stores we believed to be the most deficient. We did this by comparing the stamp cancellation to the volume of gross sales in each store. We now have found out from experience that due to many variable factors, this method of proving a vendor's taxable sales of over 40¢ is not conclusive. For example, we now know that some of the S. S. Kresge Co. stores reporting a taxable percentage of 70% or more were what is known as "dollar stores". Another factor would be, where the bulk of the sales would come from departments which carry a high percentage of taxable sales such as hosiery, ready to wear, toys and games, infant or childrens' wear, men and boys' furnishings, etc. We now have have come to the conclusion that should we have checked all the S. S. Kresge Co. Ohio stores, we would have had a substantial increase in the amount recommended for assessment.

Knowing that perhaps this audit would be contested in the higher courts, we decided to test check each store by departments. The reason for this was that in stores of this type there are a variety of commodities sold and both the volume and taxable percentage in each department varies considerably. By establishing a percentage ratio that taxable sales bear to gross sales in each department, the volume of sales and the taxable percentages in any one department would not control an over all percentage.

This, I believe, is an important factor to consider when checking a variety store for the reason that much of the merchandise sold is seasonal and by applying a percentage ratio to each respective department, the weight of taxable and exempt sales will be distributed proportionately.

It might be of interest to know that approximately 25% of this company's total yearly sales are made during the Christmas season and should we have made a test check during this period, the percentage of taxable sales to gross sales would have shown a substantial increase.

The S. S. Kresge Co. would never consent to a test check being made at this time of the year for the reason that the percentage of taxable sales of over 40¢ to gross would be abnormal. However, they lose sight of the fact that approximately 25% of their yearly sales falls within that category.

In attempting to establish a taxable percentage for each department, Attorney Carlton Dargusch proposed that instead of test checking each department in every store, that we limit the test checking of any one department to 3 stores and that the percentages developed from this test check be applied to each department in all their Ohio stores.

He also proposed that the selection of the stores to be used to test check the various departments would be left entirely up to the supervisor of the S. S. Kresge Company

who had charge of the district in which the stores were located.

We were conscious of the fact that this was a big undertaking and feeling that, in order for it to succeed, we would need their cooperation, we decided to accept his proposal. It is my opinion, that if the person or persons responsible for the selection of the stores and the departments within the stores, would have used good judgment, this plan could have worked out satisfactorily.

We were not notified by the S. S. Kresge Co. as to the location of the stores to be checked. However, I did send examiners assigned to the 6th sales tax district to visit all S. S. Kresge Co. stores within a radius of 70 miles of Youngstown, Ohio and their reports to me were that the departments being test checked in the various stores were below average and would not present a true picture of the vendor's taxable sales of over 40c.

This fact was verified when, after applying the percentages developed from the test check against each department in all Ohio stores, we found that 26 of the 83 S. S. Kresge Co. stores were overcancelled.

We refused to accept the results of this test check as being correct, for the reason that the taxable sales as shown on this company's records were based on the amount of prepaid tax receipts cancelled by the sales clerk at each register and if the sales clerk failed to cancel the prepaid tax receipts on a taxable transaction, the sale would be shown on the vendor's records as a taxable sale of less than 41c. It has also been our experience that whenever a vendor estimates his or her taxable sales based on their stamp cancellation that invariably we find a tax deficiency.

The overcancellation amounted to approximately $70,000 in tax and if we would have accepted this test check as being

correct, we would have had to credit this overcancellation against the stores showing a tax deficiency.

We then decided to conduct the test check as originally planned by test checking each department in all 36 stores. (An examiner from the Ohio Department of Taxation was stationed in each store and tally sheets were placed at each cash register. At the end of each day, the original tally sheets were summarized by the store personnel and checked by our examiners. The original tally sheets were then sent to the S. S. Kresge Co. general office at Detroit, Michigan.)

For a detailed account of the procedure used in making this audit, see Examiner's Confidential Remarks and special explanation attached to Central Office copy of audit.

WALTER W. SWEENEY,
Manager

APPENDIX VI

Section 1 of the Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX VII

Section 5739.02, Revised Code of Ohio

For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crises, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering sections 5739.01 to 5739.31, inclusive, of the Revised Code, an excise tax is hereby levied on each retail sale made in this state of tangible personal property.

(A) The tax is as follows:

(1) No tax is imposed if the price is less than forty-one cents;

(2) Two cents, if the price is more than forty but not more than seventy cents;

(3) Three cents, if the price is more than seventy cents but not more than one dollar;

(4) If the price is in excess of one dollar, three cents on each full dollar and in addition, one cent if the price exceeds an even number of dollars by more than eight but not more than forty cents; two cents if such excess is more than forty but not more than seventy cents; and three cents if such excess is over seventy cents.

The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

In the case of a sale, the price of which consists in whole or in part of rentals for the use of the thing transferred, the

tax shall, as regards such rentals, be measured by the in
stallments thereof.

(B) The tax does not apply to the following:

(1) Sales to the state, or any of its political subdivisions;

(2) Sales of food for human consumption off the premise
where sold;

(3) Sales of feed and seeds;

(4) Sales of newspapers and of magazine subscription
shipped by second class mail;

(5) Sales of ice;

(6) Sales of motor vehicle fuel and of liquid fuel upon
receipt, use, distribution, or sale of which in this state a
tax is imposed by the law of this state;

(7) Sales of cigarettes, and of brewer's wort and malt
upon the sale of which a tax is imposed by the law of thi
state;

(8) Sales of beer as defined by section 4305.08 of the Re
vised Code, whether in bulk or in bottles, sales of wine, an
sales of spirituous liquors by the department of liquo
control;

(9) Sales of artificial gas by a gas company as defined i
section 5727.01 of the Revised Code, of natural gas by a
natural gas company as defined in said section, of electri
city by an electric light company, as defined in said section
of water by a water works company, as defined in said sec
tion, if in each case the thing sold is delivered to consumer
through wires, pipes, or conduits; and all sales by any othe
public utility as defined in section 5727.01 of the Revise
Code;

(10) Casual and isolated sales by a vendor not engage
in the business of selling tangible personal property excep
as to such sales of motor vehicles and house trailers;

(11) Sales not within the taxing power of this state
under constitution of the United States;

(12) The transportation of persons or property;

(13) Professional, insurance, or personal service transactions which involve sales as inconsequential elements, for which no separate charges are made;

(14) Sales of tangible personal property to charitable and religious organizations;

(15) Sales of nitroglycerine or explosives for the shooting or explosion of an oil or gas well or coal mine;

(16) Sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university;

(17) Sales of hearses and ambulances to residents of other states for use exclusively outside this state;

(18) Sales of ships, gas-filled dirigibles, or vessels used or to be used principally in interstate or foreign commerce, and repairs, alterations, fuel, and lubricants for such ships, gas-filled dirigibles, or vessels.

For the purpose of the proper administration of sections 5739.01 to 5739.31, inclusive, of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established.

As used in this section "food" includes cereals and cereal products; milk and milk products including ice cream, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruits, fruit products, and pure fruit juices, condiments, sugar and sugar products, coffee and coffee substitutes, tea, and cocoa and cocoa products.

As used in this section "food" does not include: spirituous or malt liquors; soft drinks; sodas and beverages which are ordinarily dispensed at bars and soda fountains or in connection therewith other than coffee, tea, and cocoa; root beer and root beer extracts; malt and malt extracts;

mineral oils, cod liver oil, halibut liver oil; medicines, including tonics, vitamin preparations and other products sold primarily for their medicinal properties; and water, including mineral, bottled, and carbonated waters and ice.

Section 5739.04, Revised Code of Ohio

Prepaid tax receipts required by section 5739.03 of the Revised Code shall be issued by the tax commissioner in such denominations as he deems necessary. They shall be printed on durable paper, shall be of a different design and distinctly different coloring for each denomination, and shall bear plainly on their face the denominations represented thereby.

Section 5739.10, Revised Code of Ohio

In addition to the tax levied in section 5739.02 of the Revised Code, and to secure the same objectives specified in such section, there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per cent of the receipts derived from all such retail sales, except retail sales under forty-one cents and those to which the excise tax imposed by section 5739.02 of the Revised Code is made inapplicable by division (B) of said section. For the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under forty-one cents, and no assessment shall be made against any vendor for retail sales of less than forty-one cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than forty-one cents; provided that where a vendor does not have adequate records of receipts from his retail sales in excess of forty cents, the tax commissioner may refuse to accept the vendor's return, and upon the basis of test checks of the vendor's business for a representative

periods and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales. The tax imposed by this section shall be determined by deducting from the sum representing three per cent of the receipts from such retail sales the amount of tax paid to the state by means of canceling prepaid tax receipts in accordance with section 5739.03 of the Revised Code. This section does not effect any duty of the vendor under sections 5739.01 to 5739.19, inclusive, and 5739.26 to 5739.31, inclusive, of the Revised Code, nor the liability of any consumer to pay any tax imposed by section 5739.02 of the Revised Code.

Section 5739.13, Revised Code of Ohio

If any vendor collects the tax imposed by section 5739.02 of the Revised Code, and fails to cancel the prepaid tax receipts in the manner prescribed by sections 5739.01 to 5739.31, inclusive, of the Revised Code, and by the regulations of the tax commissioner, he shall be personally liable for the amount of prepaid tax receipts which he failed to cancel. The commissioner may make an assessment against such vendor upon any information in his possession.

If any vendor fails to collect the tax or any consumer fails to pay the tax imposed by section 5739.02 of the Revised Code, on any transaction subject to the tax, such vendor or consumer shall be personally liable for the amount of the tax applicable to the transaction. The commissioner may make an assessment against either the vendor or consumer, as the facts may require, based upon any information in his possession, provided that no assessment shall be made against a vendor in cases where such vendor can establish that he charged a purchaser or consumer the tax which the purchaser or consumer did not pay.

An assessment against a vendor in cases where the tax imposed by section 5739.02 of the Revised Code has not been collected or paid, shall not discharge the purchaser's or consumer's liability to reimburse the vendor for the tax applicable to such transaction. In case of such reimbursement no prepaid tax receipts shall be canceled.

In each case the commissioner shall give to the person assessed written notice of such assessment. Such notice may be served upon the person assessed personally or by registered or certified mail. An assessment issued against either, pursuant to the provisions of this section, shall not be considered an election of remedies, nor a bar to an assessment against the other for the tax applicable to the same transaction, provided that no assessment shall be issued against any person for the tax due on a particular transaction if said tax has actually been paid by another.

The commissioner may make an assessment against any vendor who fails to file a return required by section 5739.12 of the Revised Code or fails to remit the proper amount of tax due under section 5739.10 of the Revised Code. Notice of such assessment shall be made in the manner prescribed in this section.

Unless the vendor or consumer, to whom said notice of assessment is directed, files within thirty days after service thereof, either personally or by registered or certified mail a petition in writing, verified under oath by said vendor, consumer, or his authorized agent, having knowledge of the facts, setting forth with particularity the items of said assessment objected to, together with the reasons for such objections, said assessment shall become conclusive and the amount thereof shall be due and payable, from the vendor or consumer so assessed, to the treasurer of state. When a petition for reassessment is filed, the commissioner shall assign a time and place for the hearing of same and shall

notify the petitioner thereof by registered or certified mail, but the commissioner may continue the hearings from time to time if necessary.

A penalty of fifteen per cent shall be added to the amount of every assessment made under this section. The commissioner may adopt and promulgate rules and regulations providing for the remission of penalties added to assessments made under this section.

When any vendor or consumer files a petition for reassessment as provided in this section, the assessment made by the commissioner, together with penalties thereon, shall become due and payable within three days after notice of the finding made at the hearing has been served, either personally or by registered or certified mail, upon the party assessed.

The vendor or consumer may appeal from an assessment after it due and payable to the board of tax appeals in the same time and manner as that provided in section 5717.02 of the Revised Code.

After the expiration of the period within which the person assessed may appeal to the board of tax appeals, a certified copy of the entry of the commissioner making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the vendor's or consumer's place of business is located or the county in which the party assessed resides.

The clerk, immediately upon the filing of such entry, shall enter a judgment for the state against the vendor or consumer in the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled "special judgments for state retail sales tax."

From the date of the filing of the entry in the clerk's office, the assessment, which includes taxes and penalty, shall bear the same rate of interest and shall have the same

effect as other judgments. Execution shall issue upon such judgment upon request of the commissioner and all laws applicable to sales on execution shall be applicable to sales made under such judgments except as provided in sections 5739.01 to 5739.31, inclusive, of the Revised Code.

All money collected by the commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by sections 5739.01 to 5739.31, inclusive, of the Revised Code.

Section 5717.04, Revised Code of Ohio

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the Supreme Court or the Court of Appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the Supreme Court or to the Court of Appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the Court of Appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, re-assessments, valuations, determinations, findings, computations, or orders made by him may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of finance, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. Such notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of

such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by registerd mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

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Office Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

No. 534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

On Appeal from the Supreme Court of Ohio

S. S. KRESGE CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION

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Supreme Court of the United States

No. 534

S. S. KRESGE CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee in the above-styled cause, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves the appeal be dismissed on the ground that it does not present a substantial federal question; or in the alternative in support of appellee's motion to dismiss or affirm, respectfully states the following:

Supreme Court of the United States

No. 534

S. S. KRESGE CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS OR AFFIRM.

For the foregoing reasons and based upon the foregoing facts and authorities, this appellee moves that the Court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio.

Respectfully submitted,

MARK MCELROY,
Attorney General of Ohio,
JOSEPH D. KARAM,
ROBERT J. KOSYDAR,
Assistant Attorneys General,
State House Annex, Columbus 15, Ohio,
Attorneys for Appellee.

STATEMENT OPPOSING JURISDICTION

The appellee in the above entitled cause, for its statement in opposition to appellant's statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm, respectfully states the following:

I.

STATEMENT OF THE CASE AND FACTS

The appellant is seeking a review of a unanimous decision of the Ohio Supreme Court rendered on March 23, 1960, whereby such Court affirmed a decision of the Ohio Board of Tax Appeals and upheld a sales tax assessment made by the Tax Commissioner of Ohio, Stanley J. Bowers, appellee herein.

This matter originated on February 24, 1958, when the Tax Commissioner of Ohio issued a sales tax assessment against the appellant. The period of the assessment was January 1, 1952 to December 31, 1955 and the total assessment amounted to $396,579.41. The statutory 15% penalty was conditionally remitted by the Tax Commissioner.

The sales tax assessment resulted from the finding by the Tax Commissioner of Ohio that the appellant did not have adequate records as required by Section 5739.11, Ohio Revised Code to support the semi-annual returns of sales tax which it had been filing. By the provisions of Section 5739.10, Ohio Revised Code, the Tax Commissioner of Ohio is granted authority to conduct test checks of a taxpayer's business to ascertain the correct amount of sales tax which should have been paid. Acting under such authority, the Tax Commissioner of Ohio conducted test checks in 36 of the appellant's five and ten cent variety stores during the months of March, April and May of 1956. Although the appellant operates 83 stores in Ohio

test checks were conducted in only 36 and the results of these test checks were applied only to these 36 stores in arriving at the assessment in issue.

Each of the test checks were conducted over a period of six (6) consecutive days. *In compliance with the requests of S. S. Kresge*, through its counsel:

1. The test checks were conducted only at such times as would eliminate the great seasonal sales peaks which occurred during Easter, St. Valentine's Day, Memorial Day, early summer, Fourth of July, Labor Day and the "Back to School" period, Thanksgiving and Christmas.

2. The test checks were departmentalized, that is, instead of showing an average or deficiency for *each store as a whole*, each department of each of the 36 stores was separately tabulated.

Field examiners of the Tax Commissioner of Ohio spent one month at appellant's Detroit headquarters studying books and records kept. Following this survey the machinery for a physical test check was set up in cooperation with appellant and with full agreement of appellant as to procedures and methods to be used. Appellant, *not* the Tax Commissioner of Ohio, suggested one week as a representative test check period. Appellant requested that the time be staggered and that all stores not to be checked at once. Appellant chose which dates and which stores would be test checked. All of appellant's records relating to sales exempt by character (e.g. seeds and candy) were accepted by the Tax Commissioner of Ohio and used in the audit. This is but a mere sampling of the cooperation and spirit shown by the Tax Commissioner in this audit. Even the effort taken to conduct this audit by store and departments within said stores and thereby avoid any inaccuracy to the taxpayer, shows duty guided by fairness. Records of any sort or nature that would satisfy legal

requirements were requested by the tax examiners—none were ever offered.

On the basis of the test checks so conducted and all other information available to him, the Tax Commissioner of Ohio issued the assessment in issue. The appellant duly filed a petition for reassessment pursuant to Section 5739.13, Ohio Revised Code, which grants to it an administrative hearing before the Tax Commissioner of Ohio and is a prerequisite to a judicial appeal. At this administrative hearing, the only information presented to the Tax Commissioner by the appellant was a composite test check of the various daily test checks of individual departments of individual stores in such a way as to total one week's operation of a single *imaginary* store. However, such composite check combined in each instance the *minimum* day of the *minimum* department of the *minimum* store. Such information, the only information submitted to the Tax Commissioner of Ohio by the appellant, was found not to be of any value and the assessment was affirmed in a journal entry issued by the Tax Commissioner of Ohio under date of February 21, 1958.

The appellant appealed, pursuant to Section 5717.02 Ohio Revised Code, to the Ohio Board of Tax Appeals, which is a quasi-judicial body having appellate jurisdiction over the Tax Commissioner of Ohio. The appellant contended before the Ohio Board of Tax Appeals: (1) that it had adequate records and that the sales tax assessment as such was not valid; (2) that the test check was not conducted during a representative period as required by law; and (3) that the Tax Commissioner did not apply other information as required by law.

At the hearing before the Ohio Board of Tax Appeals, which hearing lasted 4 days, the appellant introduced the testimony of 4 witnesses and numerous exhibits. The Tax

Commissioner of Ohio introduced the testimony of the two senior field examiners who conducted and supervised the test checks and audit. The Ohio Board of Tax Appeals ruled that the appellant did not maintain adequate records as required by law and that the test checks were validly conducted. The Ohio Board held that the appellant system of recording taxable sales was not susceptible of audit by the taxing officials to determine its correctness and while adequate for the appellant's purposes was not a fulfillment of the requirements of Ohio law. The Board of Tax Appeals further ruled that the evidence submitted by the appellant, while voluminous, was highly speculative and not of probative value. The Board held on the basis of the evidence submitted that the test check was conducted during a representative period as required by law and that the assessment as made was valid and lawful.

The appellant appealed directly to the Ohio Supreme Court which under Section 5717.04, Ohio Revised Code, is permissible in Ohio tax cases. The appellant in addition to the errors raised before the Ohio Board of Tax Appeals raised the contention that the decision of the Ohio Board of Tax Appeals was in violation of its rights guaranteed under Section 1 of the Fourteenth Amendment of the United States Constitution. The Tax Commissioner of Ohio raised the question of timeliness as to this issue inasmuch as it had not been raised before the Ohio Board of Tax Appeals. The Ohio Supreme Court specifically ruled that the issue of due process of law could be raised before it for the first time but that no violation of the due process of law clause had occurred. The Supreme Court after a consideration of all the evidence affirmed the decision of the Ohio Board of Tax Appeals.

II.

QUESTIONS PRESENTED

1. Was the appellant presented with an opportunity to raise the question of its constitutional rights guaranteed under Section 1 of the Fourteenth Amendment of the United States Constitution and did the Ohio Supreme Court rule on such constitutional question?

2. Was the Ohio Supreme Court correct in its ruling that there was no violation of the rights guaranteed to the appellant under the Fourteenth Amendment of the United States Constitution?

III.

DISCUSSION OF QUESTIONS PRESENTED

Before listing the questions presented, a comment must be made in answer to the alleged questions listed by appellant in its brief on pages 8-9. It is imperative that such allegations be answered since silence is to connote or clothe them with some respectability of fact. Three (3) questions listed by appellant Kresge are as follows:

1. Does Section 5739.10, Revised Code of Ohio, as construed and applied, deprive appellant of property without due process by establishing "*an arbitrary and irrebuttable presumption*" that a 6 day test check conducted to determine the percentage of appellant's taxable sales was representative of the assessment period?

2. Does the decision of the Ohio Supreme Court deprive appellant of property without due process for the reason that the Court *arbitrarily refused* to consider and give effect to the uncontradicted evidence of appellant that the 6-day test checks were not representative of the assessment period?

3. Does the decision of the Ohio Supreme Court deprive appellant of property without due process for the reason that the Court *arbitrarily refused* to give effect to that part of Section 5739.10, Revised Code of Ohio, which requires than when an assessment is made pursuant to a test check, "* * * other information relating to sales made by such vendor * * *" must be taken into consideration by the Tax Commissioner?

Question No. 1 alleges that an "arbitrary and irrebuttable presumption" has been established or set up. Neither the Tax Commissioner, the Board of Tax Appeals nor the Supreme Court of Ohio have ever stated, inferred or suggested a so-called "irrebuttable presumption" existed now or in the past. The Tax Commissioner's Order (Appendix I, pages 18-21 of appellant's brief) contains a detailed analysis into the appellant's objections and the Tax Commissioner's answers based upon the evidence presented by appellant. This order of the Tax Commissioner outlines the specific evidence offered and the detailed reasons as to why it was insufficient to change the more accurate figures produced by the test check and other information considered by the Tax Commissioner.

The Entry of the Board of Tax Appeals (Appendix II, pages 22-41 of appellant's brief) also supports the thinking of the Tax Commissioner, i.e., the evidence of appellant Kresge was insufficient to offset the percentages arrived at by test checks and insufficient to make any change in the presumption of taxation. Nowhere is there even a hint of "irrebuttable presumption."

The decision of the Supreme Court of Ohio (Appendix III; pages 41-47) again bears out the fallaciousness of appellant's positive assertion that there is an "irrebuttable presumption."

Question No. 2 alleges that the Ohio Supreme Court "arbitrarily refused" to consider and give effect to the "uncontradicted" evidence of appellant that the test checks were not representative. This charge infers that our state's high court closed its eyes to "uncontradicted evidence" by a flat refusal and thereby was not able to render the proper and just decision.

Has appellant itself ignored the fact that the Court had before it the record of testimony taken before the finder of facts, the Board of Tax Appeals? Also before the Court were all the exhibits and briefs of counsel. The Supreme Court's opinion details each objection of appellant (including this one) and answers each specifically. "Uncontroverted Evidence" alone is not enough—there must be relevancy and or materiality connecting the evidence with the issue at bar. This so-called "uncontroverted evidence" argument was at each stage of appeal laid at rest.

Question No. 3 alleges an issue of comparable caliber. However, this one charges "other information" was ignored by the Court. Every shred of information was considered and passed on by the Tax Commissioner, the Board of Tax Appeals and the Ohio Supreme Court. Their respective entries and opinions bear this out.

1. The appellant was presented with several opportunities to raise the question of its constitutional rights and further, the Supreme Court of Ohio specifically recognized the issue being raised and ruled upon same.

After the initial assessment was levied by the Tax Commissioner, the appellant-taxpayer had a right to petition for reassessment directed to the Tax Commissioner under Section 5739.13, Revised Code of Ohio. This, the appellant chose to do and a hearing was had where evidence was presented supporting appellant's position. Following this hearing and a final determination issuing from the Tax

Commissioner, the appellant was entitled to and did so choose a trial *de novo* before the Board of Tax Appeals pursuant to Section 5717.02, Revised Code of Ohio. A full and complete hearing was had that lasted four (4) days. A record was taken, exhibits offered, rules of evidence applied and the decision of the Tax Commissioner was affirmed in a lengthy detailed opinion.

Under Section 5717.04, Revised Code of Ohio, the appellant has a right to appeal directly to the Supreme Court of Ohio. Again the appellant chose to appeal. Under this statute, the Supreme Court of Ohio can reverse or modify a decision of the Board of Tax Appeals if upon the hearing and consideration of the "record" and "evidence" the Court finds the lower decision is unreasonable and unlawful. Statutory power of course is not required to give the high court power to reverse because of constitutionality of the taxing law or an infringement of the taxpayer's rights.

The Supreme Court of Ohio, as did the lower tribunals, did not deny appellant an opportunity to be heard, to offer evidence, or such.

The appellee-Tax Commissioner raised the issue of *timeliness* in the Ohio Supreme Court when the appellant taxpayer raised its constitutional questions. The Supreme Court of Ohio overruled this objection and gave its reasons not only in the opinion but made it a part of the syllabus, which is the law of the case in Ohio.

The Supreme Court of Ohio stated on page 406 of its opinion (Appendix IH, page 43 of appellant's brief):

> "The appellant questions the constitutionality of Section 5739.10, Revised Code, on the grounds that the appellant is deprived of its property without due process of law because of misconstruction and misapplication of the statutory provisions, and because

> an irrebuttable presumption of the validity of the tax checks is thereby created, all in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

The high court then answered this in paragraph 4 of its syllabus wherein it states:

> "4. Such provisions of Section 5739.10, Revised Code, are not violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting the taking of property without due process of law."

How then, can appellant here assert that it was deprived of the opportunity to raise the constitutional question in view of the quoted portions from the Court's findings? Appellee submits there is no basis for the allegation of "no opportunity" and its being raised here is done without foundation or reason.

2. The Ohio Supreme Court was correct in its ruling that there was no violation of the rights guaranteed to the appellant under the Fourteenth Amendment of the United States Constitution.

The appellant contends that its rights guaranteed under the Fourteenth Amendment of the United States Constitution were violated since the Ohio Supreme Court decreed an irrebuttable presumption of taxability against it. While Ohio in its Sales Tax Act does have a presumption of taxability, such is not and never has been an irrebuttable presumption.

The Ohio sales tax is an excise tax levied on each sale consummated in the State of Ohio. Section 5739.02, Ohio Revised Code. The sales tax is collected from the customer or consumer making the purchase and is collected by the retailer such as the appellant who at each 6 month period is required to return such money to the State of Ohio.

Since the retailers such as the appellant are in reality the mere collectors of the tax and not the payers, Ohio must safeguard the collection thereof. To do so, the General Assembly of Ohio has enacted the following statutory provisions:

> "Section 5739.01
>
> "
>
> "The tax collected by the vendor from the consumer under Sections 5739.01 to 5739.31, inclusive, of the Revised Code, is not part of the price, but is a tax collection for the benefit of the state, and except for the discount authorized in Section 5739.01 of the Revised Code, no person other than the state shall derive any benefit from the collection or payment of such tax.
>
> "Section 5739.02
>
> "
>
> "For the purpose of the proper administration of Sections 5739.01 to 5739.31, inclusive, of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established. "

As the Court can discern, such statutory provisions in no way create an irrebuttable presumption. *No* decision of the Ohio Supreme Court has held that an irrebuttable presumption exists. *No* decision of the Ohio Board of Tax Appeals has ever so ruled. The Board of Tax Appeals or the Court must consider all evidence submitted but if such lacks probative value, a decision affirming the Tax Commissioner is called for. This is exactly the situation here—insufficient evidence of probative value and not a case of an irrebuttable presumption.

A recent case decided by the Ohio Supreme Court best illustrates the error of the appellant's position. In the case of *Bronowicz v. Bowers*, 169 Ohio St., 193, the Tax Commissioner issued a sales tax assessment which was

subsequently modified by the Ohio Board of Tax Appeals. This case was appealed by the Tax Commissioner to the Ohio Supreme Court. Such Court affirmed the modification by the Board of Tax Appeals. If there ever was an irrebuttable presumption, the modification would have been a reversible error. Such was and is not the situation in Ohio. On this point, no constitutional rights of the appellant were violated.

The appellant further contends that its constitutional rights were violated because the Tax Commissioner failed to consider any other information besides the test checks in issuing the assessments. Section 5739.10, Ohio Revised Code, insofar as pertinent provides:

> "In addition to the tax levied in section 5739.02 of the Revised Code, and to secure the same objectives specified in such section, there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per cent of the receipts derived from all such retail sales, except retail sales under forty-one cents and those to which the excise tax imposed by section 5739.02 of the Revised Code is made inapplicable by division (B) of said section. For the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under forty-one cents, and no assessment shall be made against any vendor for retail sales of less than forty-one cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than forty-one cents; provided that where a vendor does not have adequate records of receipts from his retail sales in excess of forty cents, the tax commissioner may refuse to accept the vendor's return, and upon the basis of test checks of the vendor's business for a representative period, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales."

This section of the Ohio Revised Code was enacted actually to insure a method for the collection of the sales tax in the event a retailer failed to maintain adequate records to establish whether or not the proper amount of the tax had been paid to the State of Ohio. The appellant here failed to maintain adequate records to establish if correct returns had been filed. The method of the test checks was the only avenue available to the Tax Commissioner. Concededly, the Tax Commissioner is to consider all information at his disposal in issuing the assessment. But the only information submitted to the Tax Commissioner by the appellant was this minimum test check store on which the appellant itself chose not to rely in any further proceeding. Actually, the record reveals that the Tax Commissioner considered all the information at his disposal. Simply because the evidence submitted to the Tax Commissioner was highly speculative and lacking in probative value does not mean that such information must have been relied on solely. This was in effect the ruling of the Ohio Board of Tax Appeals and the Ohio Supreme Court and is in no manner a violation of the appellant's constitutional rights. In fact this matter is strictly a question of interpretation and evaluation of the evidence presented at a tax trial. The fact that the Ohio Board of Tax Appeals and Ohio Supreme Court interpreted such evidence contrary to that submitted by the appellant raises no constitutional question nor does such constitute a violation of any constitutional rights.

IV.

CONCLUSION.

It is submitted that neither the constitution of the United States nor of Ohio have been violated; that appellant's rights, constitutional or otherwise, have in no way been transgressed; and further that the Supreme Court of Ohio, plus the lower tribunals in this cause, have in no way acted wrongly.

Respectfully submitted,

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No. 534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Appeal from the Supreme Court of Ohio

S. S. KRESGE CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

REPLY TO MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION

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REPLY TO MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION

I

INTRODUCTORY REMARKS

Appellant will not burden the Court with a complete list of all the misstatements of fact in which counsel for the appellee have indulged themselves, but does feel it necessary to call the Court's attention to the most glaring misstatements of fact; and to emphasize what the record in this case actually states; for it is the record which must control, and not the consistent and repeated misstatements of fact of counsel for the appellee.

The record in the case clearly, and beyond any doubt whatsoever, establishes the fact that the appellant did not select the stores, the times and the manner of the tax commissioner's test checks, upon which test checks the tax commissioner's assessment was based. Appellant at all times objected, not only to the procedures and methods used by the tax commissioner, but to the necessity and appropriateness of the test checks in the first instance, and consistently thereafter.

The testimony of the State's own witness, N. E. Volsko, at pages 370 to 372, and 388 of the record in this case, as well as that examiner's confidential remarks included in the original transcript sent by the tax commissioner to the Board of Tax Appeals of Ohio, which is a part of the record in this case, (Appellant's Exhibit 4, page 47 of the appellant's jurisdictional statement), completely settles, beyond any contradiction, any question as to who selected the stores to be test checked by the state. The above referred to portions of the record in this case show conclusively that the State selected the stores to be test checked and the times and manner of the State's 1956 test checks.

It is indeed unfortunate that counsel for the appellee, in the statement opposing jurisdiction, failed to cite any pages in the record in support of the claim that the appellant selected the stores, the times and the manner of the test checks. It is quite obvious that counsel for the appellee was unable to cite any portion of the record, since the claim made by counsel for the appellee in the statement opposing jurisdiction is entirely without foundation, and there is no support whatsoever for such claim in the record in this case.

If there is any question whatsoever in this case as to whether the record supports the assumption and con-

clusion of the Supreme Court of Ohio that appellant selected the stores, the times and the manner of the test checks, that question is now settled by dissenting opinion of Judge C. William O'Neill of the Supreme Court of Ohio, in *King Drug Co. vs. Bowers*, 171 Ohio St., 461, decided 1 February 1961, in which dissenting opinion Judge Kingsley A. Taft joined. In the dissenting opinion Judge O'Neill made the following statement:

> "The third paragraph of the syllabus of the Kresge case holds that the test checks in that case were 'for a representative period'. An examination of the opinion discloses, however, that that conclusion was reached upon the assumption (page 407) that the test checks were made 'in the manner, at the stores and at times suggested by the appellant itself. Under these circumstances the appellant can not be heard to complain that the statutory requirement for 'a representative period' was not met duly and fairly.
>
> "The record in the instant case presents an entirely different set of facts and in no way justifies the assumption upon which the judgment was reached in the Kresge case.
>
> "*(A careful scrutiny of the record in the Kresge case suggests that the assumption in the Court's opinion in that case was not supported by the record).*" (emphasis added)

A copy of the opinion in the *King Drug* case, supra, is attached in Appendix I, for the Court's convenience.

Thus, there can be no dispute as to the arbitrary denial of appellant's Federal Constitutional rights in this case, for two members of the Supreme Court of Ohio (Judges O'Neill and Taft) now recognize that the Court's assumption that appellant selected the stores, the times and the manner of the test checks is not supported by the record in the case.

II

AN IRREBUTTABLE PRESUMPTION IN FAVOR OF THE STATE OF OHIO WAS CREATED BY THE SUPREME COURT OF OHIO.

It is true that neither the Board of Tax Appeals of Ohio, nor the Supreme Court of Ohio, in denying the appellant's Federal Constitutional rights, actually used the words "irrebuttable presumption". It is submitted, however, that the decision of the Supreme Court of Ohio clearly establishes an irrebuttable presumption against the appellant, in favor of the state. The avoidance of use of repugnant terms cannot cloak a judicial act with constitutionality, for it is the act itself, and not the description of it, which is unconstitutional.

It is not the language of the Supreme Court of Ohio that is here appealed from, but rather its decision, which failed utterly to require the tax commissioner to do anything in the face of the clear, substantial and uncontradicted evidence offered by appellant. The tax commissioner simply was not required to go forward and present a case after the introduction of clear, substantial and uncontracited evidence by the appellant.

At all times throughout this litigation, the tax commissioner has defended his arbitrary assessment by simple reliance on the presumption of validity which attaches to the acts of public officials, and made no effort, in the face of appellant's clear, substantial and uncontradicted evidence to present evidence in rebuttal. Judicial approval of the tax commissioner's inaction, coupled with a total disregard for the clear, substantial and uncontradicted evidence of appellant showing the contrary, created an irrebuttable presumption in favor of the state.

III

THE APPELLANT HAS BEEN DENIED A HEARING ON THE QUESTION OF THE VIOLATION OF ITS FEDERAL CONSTITUTIONAL RIGHTS.

In the Supreme Court of Ohio, the appellant sought restoration of its Federal Constitutional rights denied by the Board of Tax Appeals in its failure to require the tax commissioner to consider "other information relating to sales made by such vendor", i. e. this appellant, before an assessment was made by the tax commissioner, and in which respect the Board of Tax Appeals likewise failed. Appellant's Exhibits J, K and L presented to the Board of Tax Appeals, clearly disclose a constant trend of upgrading of price levels during the years covered by the assessment. The appellant also sought, in the Supreme Court of Ohio, restoration of its Federal Constitutional rights denied by the Board of Tax Appeals through the application of an irrebuttable presumption against the appellant, and in favor of the state.

The Supreme Court of Ohio, at page 407 of its opinion said:

> "The question of the validity of the various test checks disappears when it is observed that they were made at each of thirty-six of the appellant's stores in each department thereof for six day periods in the manner, at the stores and at times suggested by the appellant itself. Under these circumstances, the appellant cannot be heard to complain * * *."

As previously pointed out in both the Jurisdictional Statement and the earlier portions of this reply, the above estoppel established against the appellant by the Supreme Court of Ohio is based upon a gross mistake of fact by the Court, which resulted from the consistent and repeated misstatements of fact by counsel for the appellee.

As previously stated in "*Introductory Remarks*", this gross mistake of fact has now been recognized by Judges C. William O'Neill and Kingsley A. Taft of the Supreme Court of Ohio in the dissenting opinion in *King Drug Company vs. Bowers*, supra, and which opinion is set forth in full in Appendix I herein, for the Court's convenience.

That the Supreme Court of Ohio would decide the case and refuse to hear the appellant's Federal Constitutional arguments on the basis of such a gross mistake of fact, obviously could not be reasonably anticipated by the appellant, at any time prior to the decision of the Supreme Court itself. Appellant, therefore, contended at its first effective opportunity thereafter, namely in the Application for Rehearing filed in the Supreme Court of Ohio, that its Federal Constitutional rights had been further violated by the Supreme Court of Ohio in denying appellant the right to be heard on the merits and on the Federal Constitutional questions previously presented to that Court. Such a procedure is not only proper, it is in fact the only one available to this, or any other, appellant, who is surprised by a decision of a state Court. Only by the exercise of jurisdiction in this case, may the appellant be afforded a judicial forum in which to invoke its Federal Constitutional rights.

The Supreme Court of Ohio, relying on a gross mistake of fact, refused to consider the clear, substantial and uncontradicted evidence of appellant, or the arguments of appellant. The Federal Constitutional rights of appellant cannot be taken from it by such an estoppal. This refusal by the Supreme Court of Ohio constitutes a violation of appellant's Federal Constitutional rights in itself. This appeal affords the appellant its initial opportunity to be heard on this question, since the application for rehearing

n the Supreme Court of Ohio, containing appellant's com-
plaint that its Federal Constitutional rights had been
iolated by the denial of the right to be heard, was denied
y the Supreme Court of Ohio.

In the last analysis, assuming, for the purpose of argu-
ment only, that the Supreme Court of Ohio was right
which is now denied by Supreme Court of Ohio Judges
O'Neill and Taft in *King Drug Co. v. Bowers*, supra, see
Appendix I attached), and that appellant did select the
36 stores and the times and manner of the test checks,
appellant was still entitled to be heard in the Supreme
Court of Ohio on the merits, for not even the Supreme
Court of Ohio suggested that appellant had agreed to
he application of the six-day test checks taken by the
ax commissioner to the four-year assessment period, or
hat appellant agreed that the complete failure of the tax
commissioner to consider "other information relating to
sales made by such vendor", i.e. this appellant, was proper.
Appellant's Exhibits J, K and L, presented to the Board
of Tax Appeals, clearly disclose a constant trend of up-
grading of price levels during the years covered by the
assessment.

A most grave violation of appellant's Federal Constitu-
ional rights is present in this case, namely, the denial
of the right to be heard, a right which extends to the rich
and the poor, the low and the high, without distinction or
discrimination.

Appellant asks this Court to take jurisdiction, so that
its Federal Constitutional rights may be restored.

IV.

CONCLUSION

Appellant respectfully renews its request that this appeal be allowed.

Respectfully submitted,

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CARLTON S. DARGUSCH, JR.,
GERALD A. DONAHUE,
Attorneys for Appellant.

APPENDIX I

KING DRUG CO. OF DAYTON, D. B. A. KING DRUGS, ET AL.,
Appellants,

vs.

BOWERS, TAX COMMR.,
Appellee.

Taxation — Sales tax — Test checks for representative period — When may be made — Made of successors' stores—Section 5739.10, Revised Code—Constitutional law.

(No. 36550—Decided February 1, 1961.)

Appeal from the Board of Tax Appeals.

The appellants, King Drug Company of Dayton and King Drug Company, owned and operated 11 retail drug-stores during the audit period in question here, July 1, 1954, to February 28, 1958. Effective March 1, 1958, the appellants sold their stores to the Gray Drug Company, and shortly thereafter the latter company sold one of such stores to a Mr. Norman. Appellants filed final sales tax returns with the Department of Taxation.

After the stores were sold, the Tax Commission began a separate audit of each of the stores for such audit period, when they were owned and operated by appellants. Test checks were made of five of the stores, four of which were at the time of such checks owned and operated by the Gray Drug Company, and one by Norman, to determine the percentage of sales under 41 cents. The other six stores were not test checked. An average composite percentage of 29.2 for sales under 41 cents was arrived at and applied to all the stores. On the basis of these test

checks, appellants were given credit for nontaxable sales and assessments were made accordingly.

The final order of the Tax Commissioner was affirmed by the Board of Tax Appeals.

An appeal from the decision of the Board of Tax Appeals brings the cause to this Court for review.

Messrs. Weinberger & Grad, for appellants.

Mr. Mark McElroy, attorney general, and *Mr. John J. Dilenschneider*, for appellee.

Per Curiam. Appellants contend that Section 5739.10, Revised Code, so far as it permits the use of test checks outside the actual audit period to determine tax liability for sales made during the audit period is unconstitutional; that appellants' records of retail sales in excess of 41 cents were adequate; and that the test checks were unlawful since they were not made of appellants' stores but were made of successors' stores.

If we were to accept the theory advanced in the dissenting opinion that a test check cannot be conducted except during a period when the business belongs to and is operated by the vendor assessed, then the tax department would be powerless to protect the state with respect to the sales-tax obligations of any retail vendor whenever such business is sold or transferred to another. That we do not believe to be the legislative intent of the Sales Tax Act. In the case of *Bronowicz, d. b. a. Toledo Original Hot Dog, v. Bowers, Tax Commr.*, 169 Ohio St., 193 (in which judgment all six members of the Court who heard the case concurred), the test check was made "after plaintiff sold the [sandwich and soup] shop and it had been converted into a general restaurant."

The Board of Tax Appeals, in its opinion under review here, stated, immediately before the paragraph beginning

"Under these circumstances," and quoted in the dissenting opinion, the following:

"From the testimony and evidence, as presented to the Board of Tax Appeals at the hearing held in Cincinnati, Ohio, it seems clear that appellant did not keep the record of its sales required by Revised Code Section 5739.11, which reads as follows:

"'Each vendor shall keep complete and accurate records of sales of taxable property, together with a record of the tax collected thereon, which shall be the amount due under Sections 5739.01 to 5739.31, inclusive, of the Revised Code, and shall keep all invoices, bills of lading, and such other pertinent documents, in such form as the Tax Commissioner requires by regulation. Such records and other documents shall be open during business hours to the inspection of the commissioner, and shall be preserved for a period of four years, unless the commissioner shall, in writing, consent to their destruction within that period, or by order require that they be kept longer.'

"From the evidence on this point, we can only conclude that the cash register tapes which recorded the sales of merchandise made by the appellant, during the audit period, showed only the total amount of the sale, with no indication thereon whether the sale was a taxable sale or whether it was a non-taxable sale by virtue of being exempt from taxation because of its very nature, that is, a sale of candy, cigarettes, wine, beer, etc.

"It is also apparent from the testimony on this point that the cash register tapes showed all sales, both sales from 40 cents per unit sales and sales under 41 cents per unit sale, but with nothing on the tape to indicate which were sales of taxable merchandise and which were sales of nontaxable merchandise."

Those are the "circumstances" which the Board of Tax Appeals was considering.

Whether a test check covers "a representative period" is a factual question to be determined by the board, as it was here (and as it was in the *Dronowicz case*), and the record does not disclose any reason other than change of ownership to lead the Board of Tax Appeals or the Court to the conclusion that the test-check periods here were not "representative."

It should also be noted that the tax imposed by Section 5739.10, Revised Code, is "in addition to the tax levied in Section 5739.02 of the Revised Code and to secure the same objective specified in such section." Under this language, continued ownership obviously does not have to be an absolute requirement, otherwise the Department of Taxation, where there has been a change of ownership, would be helpless to assess a tax under this section.

This Court is of the opinion that the statute in question is constitutional, that the test checks were not unlawful, and that the decision of the Board of Tax Appeals is neither unreasonable nor unlawful. *S. S. Kresge Co. v. Bowers, Tax Commr.*, 170 Ohio St., 405, and *Obert v. Evatt, Tax Comm'r.*, 144 Ohio St., 492. The decision is, therefore, affirmed.

Decision affirmed.

WEYGANDT, C. J., ZIMMERMAN, MATTHIAS, BELL and HERBERT, JJ., concur.

TAFT and O'NEILL, JJ., dissent.

O'NEILL, J., dissenting. The majority of this Court has affirmed the decision of the Board of Tax Appeals in this case, on the grounds that the statute in question is constitutional, that the test checks were not unlawful, and that the decision of the Board of Tax Appeals is neither un-

reasonable nor unlawful, and has cited in support of this judgment the cases of *S. S. Kresge Co. v. Bowers, Tax Commr.*, 170 Ohio St., 405, and *Obert v. Evatt, Tax Commr.*, 144 Ohio St., 492.

The *Kresge case* is not dispositive of this case for two reasons.

First: The test check in the *Kresge case* was made of the vendor's business. In the instant case, the test checks were made of the business of the successor to the vendors and the business of the successor to the successor of the vendors.

The first question presented in this case is whether there is authority in law for the Tax Commissioner to make an audit of the business of a successor to the vendors and the business of the successor to the successor of the vendors and use the result of these test checks as the basis for assessments against the vendors.

The record in the *Kresge case* does not present this question, the syllabus does not decide it, and neither the syllabus nor the opinion in the *Kresge case* refers to this question, either directly or indirectly.

Second: The second question presented in this case is whether the test checks were for a representative period, as provided by Section 5739.10, Revised Code.

The third paragraph of the syllabus of the *Kresge case* holds that the test checks in that case were "for a representative period." An examination of the opinion discloses, however, that that conclusion was reached upon the assumption (page 407) that the test checks were made "in the manner, at the stores and at times suggested by the appellant itself. Under these circumstances the appellant can not be heard to complain that the statutory requirement for 'a representative period' was not met duly and fairly."

The record in the instant case presents an entirely different set of facts and in no way justifies the assumption upon which the judgment was reached in the *Kresge case*.

(A careful scrutiny of the record in the *Kresge case* suggests that the assumption in the Court's opinion in that case was not supported by the record.)

There is no reference in the syllabus or the opinion in the *Kresge case*, either directly or indirectly, as to the principles which the Tax Commissioner must observe or the policies he must follow to make a test check meet the statutory requirement of "a representative period."

The *Obert case* is not dispositive of this case for the reason that the Board of Tax Appeals, in its opinion in this case, said that "the commissioner proceeded to compute appellant's sales tax liability under the provisions of Revised Code Section 5739.10."

Since the *Obert case* was decided (February 28, 1945), the statute was amended (122 Ohio Laws, 914, Recodification Act of 1953) and the following pertinent language inserted in the section discussed by the Court in the *Obert case* (Section 5546-12*a*, General Code, now Section 5739.10, Revised Code):

"* * * there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per cent of the receipts derived from all such retail sales, *except retail sales under 41 cents* * * *. For the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under 41 cents, and no assessment shall be made against any vendor for retail sales of less than 41 cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than 41 cents; provided that where a vendor does not have adequate rec-

ords of receipts from his retail sales in excess of 40 cents, the Tax Commissioner may refuse to accept the vendor's return, and upon the basis of test checks of the vendor's business for a representative period, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales." (Emphasis indicates language inserted by amendment.)

That amendment contained the exact language under consideration in this case.

Since the *Kresge case* and the *Obert case* give no help in deciding this case, an examination must now be made of the applicable statutes and case law as it applies to the questions of law raised by the record in this case.

The Board of Tax Appeals, in its opinion, said:

"Under these circumstances it would have obviously been impossible for the Tax Commissioner to conduct a 'bracket audit' of appellant's sales provided by Revised Code Section 5739.02, and the commissioner proceeded to compute appellant's sales tax liability under the provisions of Revised Code Section 5739.10, which section reads as follows:

"'In addition to the tax levied in Section 5739.02 of the Revised Code, and to secure the same objectives specified in such section, there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per cent of the receipts derived from all such retail sales, except retail sales under 43 cents and those to which the excise tax imposed by Section 5739.02 of the Revised Code is made inapplicable by division (B) of said section. For the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under 41 cents, and no assessment shall be made against any vendor for retail sales

of less than 41 cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than 41 cents; provided that where a vendor does not have adequate records of receipts from his retail sales in excess of 40 cents, the Tax Commissioner may refuse to accept the vendor's return, and upon the basis of *test checks of the vendor's business for a representative period*, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales. The tax imposed by this section shall be determined by deducting from the sum representing three per cent of the receipts from such retail sales the amount of tax paid to the state by means of canceling prepaid tax receipts in accordance with Section 5739.03 of the Revised Code. This section does not affect any duty of the vendor under Sections 5739.01 to 5739.19, inclusive, and 5739.26 to 5739.31, inclusive, of the Revised Code, nor the liability of any consumer to pay any tax imposed by Section 5739.02 of the Revised Code.'" (Emphasis supplied.)

That conclusion is supported by the mathematical detail of each assessment set forth in the Board of Tax Appeals' opinion. The Tax Commissioner accepted as accurate the gross receipts reported by appellants, deducted tax payments made by appellants and applied the percentages for exceptions which were arrived at by the test checks conducted under authority of Section 5739.10, Revised Code, in computing appellants' assessments.

These assessments were made on the basis of the test checks by order of the Tax Commissioner. He was prohibited by law (Section 5739.10, Revised Code) from making assessments solely because the vendor has no records, or has inadequate records, of retail sales of less than 41 cents. The Tax Commissioner was not authorized under

Section 5739.10, Revised Code, to make a tax assessment upon all receipts because this section excepted sales under 41 cents.

The Tax Commissioner, having ordered test checks to determine the tax liability of appellants, is required to make such checks in accordance with the statute (Section 5739.10, Revised Code).

This was not done.

The statute is plain. It authorizes a test check of a vendor's business. It does not authorize a test check of a successor's business or the business of a successor to successors.

The Board of Tax Appeals, in its opinion, admitted this. The board here, in effect, said: "We recognize that these test checks were not carried out in accordance with the law, but we refuse to follow the law because we do not like it and we think we can legislate more logically by bureaucratic administrative fiat than did the Legislature."

The test checks were not for a representative period. The rule of law applicable to this case is clearly set forth in the *per curiam* opinion in the case of *Bronowicz, d. b. a. Toledo Original Hot Dog, v. Bowers, Tax Commr.*, 169 Ohio St., 193.

In the *Bronowicz case*, the Board of Tax Appeals modified the order of the Tax Commissioner and remanded the cause for correction, and, in accordance with such modification, stated in its entry, "where known facts exist, that the audit period and the test period are each not representative of the other in their entirety, that the assessor must be mindful of any such dissimiliarity, and give it reasonable and fair application in his order thereon made."

The Tax Commissioner appealed from that decision to the Supreme Court, and this Court affirmed the decision of the Board of Tax Appeals.

In the *Bronowicz case*, the question of whether there is authority in law for the Tax Commissioner to make an audit of the business of a successor to the vendor or the business of any person other than the vendor was not raised before the Board of Tax Appeals or in the Supreme Court. Neither the opinion of the Board of Tax Appeals nor the opinion of this Court decided the question or even discussed it, directly or indirectly.

The Board, in its opinion, admitted that the test checks were not for a representative period as required by statute.

The board held in its opinion that it does not like the result which following the statute would require and, therefore, held that the Tax Commissioner can overlook the statute.

On the record in this case, the board was compelled to conclude, as it did, that the test checks were not "for a representative period" as required by statute.

No member of this Court would permit the government to audit his income for a three-day period in the fall of 1958 and then assess his income tax for the year 1954 on the basis of that three-day audit period on the ground that the audit was for a representative period. The principle of law established by the majority in this case would go further and permit an assessment for 1954 and three succeeding years based upon a three-day audit in 1958 of the income of a successor judge.

The majority of this Court refuses to believe that the Legislature intended to say what it did say, namely, that the Tax Commissioner was authorized to make test checks of vendors' business. The principle of law applicable to this conclusion is well stated in the seventh paragraph of

the syllabus of the case of *State, ex rel. Foster, v. Evatt, Tax Commr.*, 144 Ohio St., 65, which reads as follows:

"Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Slingluff v. Weaver*, 66 Ohio St., 621, approved and followed.)"

The exclamation of despair, "In what better way or in what other way can it be done," raised by those who would sustain these assessments, is insufficient to make them lawful.

The Tax Commissioner did not follow the law in two respects:

1. The test checks were not made of the vendors' business as required by statute (Section 5739.10, Revised Code).

2. The test checks were not "for a representative period" as required by Section 5739.10, Revised Code.

The assessments, therefore, are unlawful and unreasonable.

The Tax Commissioner's and the Board of Tax Appeals' conclusion that the test checks were of "vendor's business," when admittedly they were of someone else's business, and the Tax Commissioner's and the Board of Tax Appeals' conclusion that the test checks were for "a representative period," when admittedly they were not, are unlawful and unreasonable and result in a taking of property without due process of law in violation of Section 1, Article XIV, Amendments, of the federal Constitution.

The decision of the Board of Tax Appeals should be reversed.

TAFT, J., concurs in the foregoing dissenting opinion.